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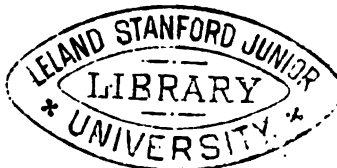
THE
AMERICAN
AND
ENGLISH
RAILROAD CASES

A COLLECTION OF ALL THE
RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA
AND ENGLAND.

J. C. THOMSON, - - - - - EDITOR.
WM. M. MCKINNEY, - - - ASSOCIATE EDITOR.

VOL. XXXVIII.

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NASHVILLE, CHATTANOOGA, AND ST. LOUIS R. CO.

v.

ALABAMA.

(128 U. S. 96.)

Examination of Servants—Color Blindness—Interstate Commerce.—Until congress legislates in regard to the examination of employees of railroads engaged in interstate commerce, the states may, by statute, require all train operators, including those engaged in interstate traffic, to be examined as to their fitness for their duties, *e.g.*, their ability to discriminate between different colors.

Same—Payment of Fees—Due Process of Law.—A statute which provides that such examinations shall be made "at the expense of the railroad companies" is not a deprivation of property without due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution.

ERROR to the Supreme Court of the State of Alabama.

Oscar R. Hundley for plaintiff in error.

T. N. McClellan, attorney-general of the state of Alabama, for defendant in error.

FIELD, J.—A statute of Alabama which took effect on the first of June, 1887, "for the protection of the travelling public against accidents caused by color blindness and defective vision," declares that all persons afflicted with color blindness and loss of visual power to the extent therein defined **Provisions of statute.** are "disqualified from serving on railroad lines within the state in the capacity of locomotive engineer, fireman, train conductor, brakeman, station agent, switchman, flagman, gate tender, or signal man, or in any other position which requires the use or discrimination of form or color signals," and makes it a misdemeanor punishable by fine of not less than ten nor more than fifty dollars for each offence, for a person to serve in any of the capacities mentioned without having obtained a certificate of fitness for his position in accordance with the provisions of the act. It provides for the appointment by the governor of a suitable number of qualified medical men throughout the state to carry the law into effect; and for the examination by them of persons to be employed in any of the capacities mentioned; prescribes rules to govern the action of the examiners, and allows them a fee of three dollars for the examination

of each person. It declares that re-examinations shall be made once in every five years, and whenever sickness, or fever, or accidents, calculated to affect the visual organs have occurred to the parties, or a majority of the board may direct; that the examinations and re-examinations shall be made at the expense of the railroad companies; and that it shall be a misdemeanor, punishable by a fine of not less than fifty nor more than five hundred dollars for each offence, for any such company to employ a person in any of the capacities mentioned, who does not possess a certificate of fitness therefor from the examiners in so far as color blindness and the visual organs are concerned.

The defendant, the Nashville, Chattanooga & St. Louis R. Co., is a corporation created under the laws of Tennessee, and runs its trains from Nashville in that state to various points

in other states, twenty-four miles of its line being in Alabama, two miles in Georgia, seven in Kentucky, and four hundred and sixty-four in Tennessee.

On the 2d of August, 1887, one James Moore was employed by the company as a train conductor on its road, and acted in that capacity, in the county of Jackson, in Alabama, without having obtained a certificate of his fitness so far as color blindness and visual powers were concerned, in accordance with the law of that state. For this employment the company was indicted in the circuit court of the state for Jackson county, under the statute mentioned, and on its plea of not guilty was convicted, and fined fifty dollars. On appeal to the supreme court of the state the judgment was affirmed, and to review it the case is brought on error to this court.

It was contended in the court below, among other things, that the statute of Alabama was repugnant to the power vested in congress to regulate commerce among the states, and that it violated the clause of the Fifth Amendment which declares that no person shall be deprived of his property without due process of law. The same positions are urged in this court, with the further position that the statute is in conflict with the clause in the third article of the constitution, which provides that the trials of all crimes shall be held in the state where they were committed.

The first question thus presented is covered by the decision of this court rendered at the last term in *Smith v. Alabama*, 124 U. S. 465; 33 Am. & Eng. R. Cas. 425. In that case the law adjudged to be valid required as a condition for a person to act as an engineer of a railroad train in that state, that he should be examined as to his qualifications by a board appointed for that purpose, and licensed if satisfied as to his qualifications, and made it a misdemeanor for any one to act as engineer who violated its

Questions involved.

Act not invalid as interfering with interstate commerce.

provisions. The act now under consideration only requires an examination and license of parties, to be employed on railroads in certain specified capacities, with reference to one particular qualification, that relating to his visual organs; but this limitation does not affect the application of the decision. If the state could lawfully require an examination as to the general fitness of a person to be employed on a railway, it could of course lawfully require an examination as to his fitness in some one particular. Color blindness is a defect of a vital character in railway employees in the various capacities mentioned. Ready and accurate perception by them of colors, and discrimination between them, are essential to safety of the trains, and, of course, of the passengers and property they carry. It is generally by signals of different colors, to each of which a separate and distinct meaning is attached, that the movement of trains is directed. Their starting, their stopping, their speed, the condition of switches, the approach of other trains, and the tracks in such case which each should take, are governed by them. Defects of vision in such cases on the part of any one employed may lead to fatal results. Color blindness, by which is meant either an imperfect perception of colors, or an inability to recognize them at all, or to distinguish between colors, or between some of them, is a defect much more common than is generally supposed. Medical treatises of recognized merit on the subject represent as the result of extended examinations that a fraction over four per cent of males are color blind. With some the defect is congenital, with others brought on by occupations in which they have been engaged, or by vicious habits in the use of liquors or food in which they have indulged. It presents itself in a great variety of forms, from an imperfect perception of colors to absolute inability to recognize them at all.

Such being the proportion of males thus affected, it is a matter of the greatest importance to safe railroad transportation of persons and property that strict examination be made as to the existence of this defect in persons seeking employment on railroads in any of the capacities mentioned.

It is conceded that the power of congress to regulate interstate commerce is plenary; that, as incident to it, congress may legislate as to the qualifications, duties, and liabilities of employees and others on railway trains engaged in that commerce; and that such legislation will supersede any state action on the subject. But until such legislation is had, it is clearly within the competency of the states to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of state and federal courts, that wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or

property, it is not only within the power of the states, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable.

In *Smith v. Alabama*, this court, recognizing previous decisions where it had been held that it was competent for the state

Smith v. Alabama. to provide redress for wrongs done and injuries committed on its citizens by parties engaged in the business of interstate commerce, notwithstanding the

power of congress over those subjects, very pertinently inquired :

"What is there to forbid the state, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, it is admitted the state has power to redress and punish? If the state has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles, or employees of sufficient skill and knowledge, or in not properly conducting and managing the act of transportation, why may not the state also impose, on behalf of the public, as additional means of prevention, penalties for the non-observance of these precautions? Why may it not define and declare what particular things shall be done and observed by such a carrier in order to insure the safety of the persons and things he carries, or of the persons and property of others liable to be affected by them?" Of course but one answer can be made to these inquiries, for clearly what the state may punish or afford redress for, when done, it may seek by proper precautions in advance to prevent. And the court in that case held that the provisions in the statute of Alabama were not strictly regulations of interstate commerce, but parts of that body of the local law which governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with an express enactment of congress in the exercise of its power over commerce, and that until so displaced they remain as the law governing carriers in the discharge of their obligations, whether engaged in purely internal commerce of the state, or in commerce among the states. The same observations may be made with respect to the provisions of the state law for the examination of parties to be employed on railways with respect to their powers of vision. Such legislation is not directed against commerce, and only affects it incidentally, and therefore cannot be called, within the meaning of the constitution, a regulation of commerce. As said in *Sherlock v. Alling*, 93 U. S. 99, 104, legislation by a

state of that character, "relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." In our judgment the statute of Alabama under consideration falls within this class.

The second position of the plaintiff in error, that the state statute is repugnant to the provision of article third of the constitution, which declares that the trial of all crimes shall be held in the state where they have been committed, is readily disposed of. The provision has reference only to trials in the federal courts; it has no application to trials in the state courts.

Venue for trial of offences.

As to the third position of the plaintiff in error, assuming that counsel intended to rely upon the Fourteenth instead of the Fifth Amendment (as the latter only applies a limit to federal authority, not restricting the powers of the state), we do not think it tenable. *Barron v. Baltimore*, 7 Pet. 243; *Livingston v. Moore*, 7 Pet. 469. Requiring railroad companies to pay the fees allowed for the examination of parties who are to serve on their railroads in one of the capacities mentioned, is not depriving them of property without due process of law. It is merely imposing upon them the expenses necessary to ascertain whether their employees possess the physical qualifications required by law.

Deprivation of property without due process of law.

Judgment affirmed.

Examination of Train Hands—Due Process of Law.—In the case of *Louisville & N. R. Co. v. Baldwin*, decided February 16, 1889, the supreme court of Alabama held (Clopton, J., dissenting), the statute involved in the principal case to be unconstitutional in so far as it required that the examiners' fees should be paid by the railroad companies, and declined to follow the decision of the federal court on the ground that that question was not involved in the case, and that therefore Justice Field's remarks were only *obiter*. In the Alabama case the question was placed directly in issue, the action being brought by one of the medical examiners appointed under the statute. The following are the opinions of the Alabama judges:

STONE, C. J.—The certificate exacted of certain employees of railroad companies, in reference to their power to distinguish colors, is certainly a legitimate exercise of the police power of the government. Its tendency is to increase the chances of safety in railroad travel, at best more or less hazardous. And it is certainly within the pale of legislative power to punish by fine or penalty any railroad company which intrusts the running of a train to the control of an agent or agents who are without the requisite evidence of qualification. This would be dealing with the conduct of the corporation,—its operation, by which it earns its income,—

and it is right and proper that it should be made to pay the expense of such violation of its duty.

The question presented by this record is different. It is not whether the road is properly appointed, properly constructed, and properly equipped, but whether persons serving it, or seeking employment at its hands, are duly qualified for the service they propose to render. This is made by the law one of the conditions upon which the particular line of duties can be undertaken by the applicant. It is a qualification he must possess before he can accept employment, and hence it is for his benefit that the examination is had, and a certificate given. The certificate when given is good for five years, and authorizes the holder of it to take employment, not alone from the one railroad company, but from any company that will employ him. On the other hand, it imposes on him no duty to continue in the service of the road on which the statute proposes to assess the expense of the examination. Can a distinction be drawn between the present case and that of any other professional man, skilled laborer, or artisan, who is required to possess certain qualifications before entering upon certain lines of employment or service? And if the expense of establishing the fact that the applicant possesses the necessary qualifications can be imposed on the employer without his consent in the one case, why not in every like case, which requires tests of qualification?

The statute under consideration attempts to impose on the railroad corporations, without their consent, and whether they will or not, the expense of the examination of certain classes of their employees, for the purpose of determining their fitness for the service. Is this not a mere legislative edict that one person (artificial) shall, without his consent, pay for services rendered to another? This is not "due process of law." Private property shall not be taken for private use. These are constitutional guaranties, and corporations are as much under their protection as natural persons are.

The case of *Morgan v. Louisiana*, 118 U. S. 455, rightly interpreted, is not opposed to the views expressed above, and furnishes no warrant for the statute we are interpreting. The question in that case arose under the quarantine laws of Louisiana, enacted for the purpose of keeping out contagious diseases. To allow vessels to land in New Orleans, not having a bill of health free of contagious or infectious diseases, would be to greatly imperil the inhabitants of the city. The quarantine inspection or examination was required primarily for the safety of the city, but secondarily and largely for the benefit of the vessel. If found free from disease, she could at once proceed, complete her voyage, and come into port. The benefit of the inspection was thus largely the vessel's, and furnished a sufficient consideration to uphold the charge made against her.

In the case of *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, *ante*, p. 1, the question we have been considering was not, and could not be, raised. Hence the remark of the eminent jurist who prepared the opinion in that case is not an authoritative adjudication.

The majority of the court hold that so much of the statute as imposes on the railroads the expense of the examination and certification of the qualification of its employees is unconstitutional and void.

SOMERVILLE, J. (concurring).—I concur in the opinion of the chief justice in this case. The law under consideration, in my judgment, passes beyond the legitimate domain of the police power, and reaches ground forbidden by the prohibitions of the constitution. It is not denied that the legislature has the power to regulate the business of common carriers engaged in running railroads in this state by a reasonable exercise of its police power, having in view the preservation of the public

safety. *Smith v. State*, 85 Ala. 341; *Smith v. Alabama*, 124 U. S. 465, 33 Am. & Eng. R. R. Cas. 425; *McDonald v. State*, 81 Ala. 279, 33 Am. & Eng. R. R. Cas. 420. It may also, in the lawful exercise of this power, require the examination of railroad employees for color-blindness, or other defects of vision, as done in this case, and may require a certificate of personal qualification for the service in question. *Baldwin v. Kouns*, 81 Ala. 272, 31 Am. & Eng. R. Cas. 347. As to these propositions there is no difference of opinion among the members of the court.

Such a certificate, however, is in the nature of a personal license to the employee. It is mainly and primarily for his benefit; as much so as the personal license or diploma of a lawyer, physician, druggist, or any other person engaged in any other employment would be. It follows his person, unless restricted, anywhere in the territory of the sovereignty granting it, and in whosoever employment the licensee may be engaged. It is only incidentally beneficial to the employer, so long as the employment may subsist. It is not the property of the employer, but of the employee. The debt incurred for the service rendered in making the examination is therefore the debt of the latter, not of the former. The law-making power can enact no edict by which a legal liability for the debt of one person can be fastened on another without due process of legal proceedings, according to the rules and forms established for the protection of private rights. It cannot take the property or money of one person, and give it to another, by naked transfer, nor impose a liability on one person for the private benefit of another, in the absence of some relation between the parties which brings the case within the sphere of the police power. There is a line where taxation may become spoliation. So laws, under the guise of police regulations, may reach the constitutional dead-line of property confiscation. It is impossible to forecast the logical results which may practically flow from the opposite conclusion. Farmers might as well be compelled to pay the licenses of commission merchants employed in sampling their cotton; druggists, for the diplomas of their clerks; the patrons of schools, for certificates of qualification required for teachers; patients, for the diplomas of doctors; or clients, for those of lawyers. No precedent known to us among the adjudged cases goes to this extent, or lays down any principle which, in our opinion, would support the constitutionality of the law under consideration, so far as it seeks to make the railroad companies liable for the expenses incurred in the examination of employees under the provisions of the act.

CLOPTON, J. (dissenting).—Appellee was appointed an examiner under the provisions of "An act for the protection of the travelling public against accidents caused by color-blindness and defective vision." The act disqualifies all persons affected with color-blindness and loss of visual power, one or both, to the extent defined therein, from serving on railroad lines in the capacity of locomotive engineer, fireman, train-conductor, brakeman, gate-tender, or signal-man, or in any other position which requires the use or discrimination of form or color signals; and makes it a misdemeanor for any person to serve in any of the capacities mentioned without first having obtained a certificate of fitness in accordance with the provisions of the act. It requires the governor to appoint as examiners a suitable number of properly qualified medical men distributed throughout the state; authorizes any one of them to make the examination, and issue the certificate; and provides for prescribing the methods in which the examinations shall be made. The examiner is entitled to a fee of three dollars. The third section provides "that on and after the 1st day of June, 1887, examinations and re-examinations, at the expense of the railroad companies, shall be required under this law; and any railroad com-

pany, officer, or agent of the same, employing after said date a person in any of the capacities specified in section one of this act, who does not possess a certificate of fitness therefor, in so far as color-blindness and visual powers are concerned, duly issued in accordance with the requirements of this act, shall be guilty of a misdemeanor, and for each and every offence shall be punished by a fine of not less than fifty, nor more than five hundred, dollars: provided, that those persons already in employment in said capacities on the first day of June, 1887, shall be allowed until the first day of August, 1887, in which to procure the necessary certificates." Acts 1886-87, p. 87. Appellee brings the action to recover of defendant the fees for examinations of persons serving in the specified capacities on a railroad in this state. The main contention between the parties relates to the power of the legislature to impose upon the railroad companies the expense of the examinations and re-examinations required by the act.

The police power, which has always been regarded of the utmost importance, and as essential to good order, extends to the protection of the lives, health, comfort, safety, and quiet of all persons, and to the protection of all property. In respect to railroads, it has been said by a learned judge: "It may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety beams in case of the breaking of axle-trees, the number of brakemen upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be." As to their employees, it may be extended to the police, which the corporations themselves exercise in the absence of legislative regulations. *Thorpe v. Rutland, etc., R. Co.*, 62 Amer. Dec. 625.

In *McDonald v. State*, 81 Ala. 279, 33 Am. & Eng. R. Cas. 420, the act "to require locomotive engineers in this state to be examined and licensed by a board to be appointed by the governor for that purpose" was brought before this court. The enactment declares unlawful, and makes a misdemeanor, for the engineer of any railroad train in this state to drive or operate any train of cars or engine upon the main line or road-bed of any railroad in this state, which is used for the transportation of persons, passengers, or freight, without first undergoing an examination and obtaining a license as therein provided. The act requires the governor to appoint a board of examiners, who are authorized to make the examinations, and to issue the licenses; and the examining member of the board is entitled to a fee of five dollars, to be paid by the applicant. It was contended that the act is a regulation of commerce between the states, and contravenes the constitution of the United States. *Somerville, J.*, speaking for the court, says: "In our opinion, it is a mere internal police regulation, which was competent to be provided for by the state, as a proper mode of preserving the safety of the travelling public, and other persons whose lives may well be imperilled by the negligence of ignorant and incompetent engineers."

The same statute was brought before the supreme court of the United States in *Smith v. Alabama*, 124 U. S. 465, 33 Am. & Eng. R. Cas. 425, on error to this court, when the same constitutional objection was made. The validity of the act was maintained as a valid exercise of the police power. *Matthews, J.*, says: "It is properly an act of legislation, within the scope of the admitted power reserved to the state to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public safety of person and property."

The statute now under consideration came before the same court in *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, *ante*, p. 1; also on error to this court. After referring to the decision in *Smith v. Alabama*, and the provisions of the statute adjudged to be valid in that case, Field, J., says: "The act now under consideration only requires an examination and license of parties to be employed on railroads in certain specified capacities, with reference to one particular qualification,—that relating to his visual organs; but this limitation does not affect the application of the decision. If the state could lawfully require an examination as to the general fitness of a person to be employed on a railway, it could, of course, lawfully require an examination as to his fitness in some one particular." The statute was held to constitute a part of that body of the local law which governs the relation between carriers of passengers and freight and the public who employ them. It relates to the duties of railroad companies, and the rights of the travelling public, defining and declaring that certain specified things shall be done and observed to insure the safe carriage of passengers. In view of the foregoing adjudications, that the provisions of the act fall within the class of police regulations we cannot regard as an open question.

The legislature, having the power to supervise and regulate the business of railway companies, so far as may be needful to the safety of passengers, had implied authority to provide suitable and efficient means of enforcing the regulations, and impose the expense on the companies. On this principle rest the provisions of many such statutes. Dealers in many classes of merchandise are required to submit them to inspection, and dealers using weights and measures to have them officially approved, and pay the fees of the officers. Steam-vessels are required to submit to inspection, and pay the expense thereof. The duties have often been imposed on railroad companies to fence their roads, station flag-men at public crossings, and provide safeguards at places of danger at their own expense. The statutes of the several states afford many other illustrations of the application of the same principle, the constitutionality of which has not been doubted. *Boston & M. R. Co. v. Commissioners*, 79 Me. 386; *Morgan v. Louisiana*, 118 U. S. 455; *Thorpe v. Rutland, etc., R. Co.*, *supra*; *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573. The supervision is not because of benefit to the parties whose business is supervised, but in the interest of the public good, health, and safety. If the state has the authority to impose upon railroad companies the expense of inspecting their tracks and machinery, of stationing flag-men at public crossings, and providing safeguards when necessary, on no sound principle can the right be denied to have their employees examined by a competent board constituted by state authority, and to require the companies to pay the reasonable expense of ascertaining that their employees possess the qualifications required by law,—the expense in ascertaining that the agencies used by them in operating their roads, the fitness of which is essential to the protection and safety of life and property, are suitable and efficient. This, as I understand it, is the view of the statute taken in *Nashville, C. & St. L. R. Co. v. Alabama*, *supra*, where, in answer to the objection that the act deprived the companies of property without due process of law, Field, J., says: "Requiring railroad companies to pay the fees allowed for the examination of parties who are to serve on their railroad in one of the capacities mentioned, is not depriving them of property without due process of law. It is merely imposing upon them the expenses necessary to ascertain whether their employees possess the physical qualifications required by law."

But, conceding the right to require payment of the expense of enforcing proper police regulations, counsel contend that the statute operates to

create a state board of examiners before whom every person desiring to be employed in the specified capacities, whether or not in actual employment when the statute went into effect, shall appear and be examined, to the end that the state, in exercising its licensing power, may be informed what persons can be trusted to engage in certain occupations; and the requirement that the railroad companies shall pay the expense is the imposition of a tax, under color of establishing police regulations, unauthorized by the taxing power. Taxation is not the purpose, nor ordinarily a legitimate exercise, of the police power. Its province is to supervise and regulate, in doing which a license fee may be exacted to assist in the regulation, but should not exceed the necessary or probable expense of inspecting and regulating the business to which the power is extended, including the expense of issuing the license, and compensation to the officer required, and such incidental and additional expense as may be necessary to enforce the regulations. *Van Hook v. City of Selma*, 70 Ala. 361; *Cooley, Tax'n*, 598. In establishing police regulations, a license fee may be exacted for the purpose of raising revenue; but when done the tax is not imposed under the police power, but under the separate and distinct power of taxation, and comes within the provisions of the constitution limiting the exercise of the latter power. The requirement that the railroad companies pay the expense of the examinations is not the imposition of a tax, in the constitutional sense. No part of the fee allowed the examiner, which is the only expense required to be paid, goes into the state treasury, or assists in raising the public revenue, and it cannot be applied to any other purpose than payment of the expense of the examination. By the express terms of the statute, it is allowed for each and every examination, whether or not a certificate of fitness is granted, and was intended to cover, from time to time, the expense of enforcing the statutory regulations.

If the operation of the act be, as counsel insist, to impose on the companies the fee for examining and licensing persons who are not in their employment, and who sustain no relation to them in the department of their business supervised, it goes beyond the scope and province of the police power, and falls within the provision of the constitution which prohibits private property being taken for private use, or depriving a person of property without due process of law. It is an essential constituent of a valid law, imposing upon the companies the expense, that it be restricted to the examination of persons who are to be employed or are in the service of the companies in some one of the specified capacities,—agencies employed by them to carry on their business. As is apparent from the decisions referred to above, the requirement that the examinations shall be at the expense of the companies is sustainable only as an authorized part of the system of supervision. By the statute all persons, whether or not in employment at the time the act took effect, are required to obtain the requisite certificate, and of consequence to undergo an examination before serving in any of the specified capacities. The fifth section, which allows the fee, does not prescribe in terms by whom it shall be paid. The third section specially extends the supervision to the business of the railroad companies, and fixes the time on and after which it shall be enforced. The provision is not that all examinations required by the act shall be at their expense, but that "examinations and re-examinations at the expense of the railroad companies shall be required under this law." The intention is to establish the manner of supervision, and the mode of enforcement, by examinations and re-examinations, and by imposing penalties for employing persons who do not possess the requisite certificate of fitness. The penalty is not incurred by mere contractual employment, without actual service.

But it must be conceded that the statute, fairly construed, operates to impose upon the companies the expense of examining those persons who were in their employment on and after the 1st day of June, without reference to their continuation in the service after the 1st day of the succeeding August, which time was allowed such employees to procure the requisite certificate. It was so construed in *Baldwin v. Kouns*, 81 Ala. 272, 31 Am. & Eng. R. Cas. 347. As has been said, its constitutionality can be maintained only so far as it is a legitimate exercise of the police power. Neither the persons then actually employed, nor the companies, incur the penalties prescribed by the statute until after the expiration of the time allowed such employees to obtain the certificates. Until then the supervision, as to those who were in the employment of the companies, does not commence; until then compulsory examinations of such persons cannot be made. Under the police power, the expense of no examination can be imposed upon the companies, except of the agencies used in carrying on their business when it becomes their duty to submit to supervision, and examinations may be compelled. So far as the statute requires examinations to be made prior to the 1st of August, 1887, at the forced expense of the companies, of persons in their employ on the 1st day of June preceding, without reference to their continuation in service after the 1st of August, it goes beyond a legitimate and constitutional exercise of the police power. My brothers differ from this conclusion, holding the provision of the statute under consideration unconstitutional, as not being a legitimate exercise of the police power. They express their own views. I concur in the reversal of the judgment, on the ground that the complaint does not aver facts sufficient to show liability of defendant for the examinations had between the 1st day of June and August.

Reversed and remanded.

GEORGIA PACIFIC R. CO.

v.

PROPST.

(Alabama Supreme Court, July 20, 1888.)

Conductor—Authority—Employment of Brakeman—Emergency.—In case of emergency, the conductor has implied authority to engage a person to act as brakeman in place of one disabled by sickness.

Same—Employment—Evidence.—In an action to recover damages for injuries alleged to have been received while in defendant's employment as brakeman, it appeared that plaintiff, the night-watchman at a station, was in the habit of going to a station 50 miles distant for his meals; that he voluntarily entered the train to go there; that at an intermediate station the conductor requested plaintiff to make a coupling; and that the plaintiff was injured while complying with the request. *Held*, that the evidence was insufficient to establish the employment of the plaintiff under the implied authority of the conductor to supply the place of one disabled by sickness, and that plaintiff, being a mere volunteer acting for the conductor's accommodation, could not recover.

ACTION by William H. Propst, by his next friend, against the Georgia Pacific Railway Co., to recover damages for per-

sonal injuries sustained by plaintiff while in the alleged employment of the defendant. A judgment for the plaintiff on a former trial was reversed on re-appeal and the cause remanded (see 83 Ala. 518). The opinion of Stone, C.J., on that appeal, so far as it relates to the questions raised on the present appeal, was as follows:

"The proof tends to show that the plaintiff, Propst, had served the defendant railway company in the capacity of brakeman for two or more months, but at the time of the accident and injury complained of he was not in that employment. He was then hired at monthly wages to serve as watchman at Patton Mines, one of the stations on the railroad. He had been employed to do this service by the superintendent, and his duties as watchman were local,—confined to the place or station, Patton Mines. There was conflict in the testimony whether or not the superintendent had instructed Propst to obey the orders that might be given him by the conductor and engineer of the train hereafter mentioned. A train of defendant, with Waving as conductor, was passing down the road with loaded freight cars. One of the three brakemen on the train was sick; and the conductor, feeling that he had not sufficient available force of brakemen to manage his train, either requested or commanded the plaintiff to go with him, and supply the place of the sick brakeman. The plaintiff went with him as brakeman, but it was not shown how many miles he had travelled in that capacity. Enough is shown to convince us that he had gone 30 or 40 miles or more before he reached the station at which he was injured. The conductor testified that he had no authority from the superintendent, or from the defendant, to engage or utilize the services of the plaintiff in the capacity of brakeman. Express authority for this purpose was not necessary. The circumstances themselves, about which there is no conflict of testimony, gave him the authority. In such an emergency there must be discretion and authority somewhere to supply the place of disabled or missing servants; and no one could exercise this power so well or prudently as the conductor in charge of the train. We will therefore treat the plaintiff as the lawfully employed servant of the company. Railroad companies are responsible for the conduct of their agents and officials, done in the natural or necessary discharge of duties incident to the service they are employed in. *South and North Alabama R. Co. v. Huffman*, 76 Ala. 492; *Alabama G. S. R. Co. v. Heddleston*, 82 Ala. 218, 31 Am. & Eng. R. Cas. 116. The first three counts of the complaint as amended are each of them good and sufficient.

"The fourth count of the complaint presents a different question. As we understand its phraseology, it does not charge

that the conductor either commanded or requested the plaintiff to go as brakeman on his train. The import of its language is that he was on the train of his own accord, and it is not averred that he was performing any services as brakeman. Its language is: 'When on a trip down defendant's said road into Fayette county, on the 27th day of January, 1886, as aforesaid, plaintiff, being aboard defendant's train at Berry Station, Fayette county, Alabama, was then and there ordered by the conductor or foreman of said railway company, employed to manage or superintend the business affairs of said company on the aforesaid train, and whilst in the exercise of his superintendence, to couple a freight car to others attached,' etc. There is nothing in this count which shows that the plaintiff was under, or had been brought under, the control of the conductor, or that he was acting as brakeman, or had been requested to do so. So far as this count informs us, the plaintiff was a mere passenger on the train; and, so far as the right to control or direct the movements of the plaintiff is shown in this count, the conductor would have had as much authority over any other passenger, or even a by-stander, as he had over him. Such order or direction, as averred, is entirely without the routine of the conductor's duties, and could not, by its abuse, fasten a liability on the railroad corporation. *Gilliam v. South and North Ala. R. Co.*, 70 Ala. 268, 15 Am. & Eng. R. Cas 138. The demurrer to this count ought to have been sustained."

Upon the cause being remanded plaintiff again recovered judgment, from which the defendant takes the present appeal.

McGuire & Collier for appellant.

Nesmith & Sanford for appellee.

CLOPTON, J.—The action is brought by appellee, under the act of February 12, 1885, which constitutes section 2,590 of Code 1886, to recover for injuries received while in the service of appellant. The complaint contains three counts, each of which sets forth the fact and kind of employment, and the circumstances under which the injury was received. The difference between the several counts consists in the averments of the cause of the injury. It is averred in the first count that the injury was caused by a defect in the couplings and appliances used for connecting the cars; in the second count, by a failure to have a sufficient number of brakemen and servants to operate and manage the train; and in the third count, by the negligence of the conductor, to whose orders plaintiff was bound to conform, and did conform, and that the injury resulted from his having so conformed. Under the rules of pleading prescribed by the Code, as construed by our decisions, the facts constituting the defects and negligence are averred

Sufficiency of
complaint.

with sufficient particularity, and are so presented that a material issue can be taken thereon. Each count sets fourth a substantial and legal cause of action. The demurrer was rightly overruled.

The refusal of the court to give the affirmative charge requested by the defendant presents a very different question,

Power of conductor to employ brakeman.

which is whether, conceding the truth of and all inferences that can be drawn from the evidence in favor of plaintiff, the proof *prima facie* establishes the case made by the complaint. In considering the question thus presented, it should be kept in mind that the burden is on the plaintiff to prove a case within the provisions of the statute defining the liability of employers. Under that statute, the party claiming damages must be an employee at the time of the injury by contract, express or implied, binding on defendant; and the injury must be received while rendering the service required by the particular employment, or in obeying the orders of a superior, to which the employee is bound to conform. Injury received while doing other more hazardous service not pertaining to the employment, by way of accommodation, or self-assumed, is not sufficient. The complaint, in legal effect, sets forth, as the cause of action, that the plaintiff, being in the regular employment of defendant as night-watchman, the duties of which required him to watch and guard the engines and trains, was ordered or directed to leave such employment, and act as brakeman on a coal or freight train, by the conductor, who had control thereof, to whom superintendence was entrusted, and authority delegated to give instructions, and to whose orders he was bound to conform, and was injured in attempting, by order of the conductor, to couple cars at Berry Station, by reason of the negligence or defect above stated. On the former appeal (83 Ala. 518), it was held that, in case of emergency, the conductor has implied authority to supply the place of disabled or missing servants, and to bind the defendant thereby, and that, on the facts alleged in the counts now remaining in the complaint, the plaintiff would be regarded as a lawfully employed brakeman, sufficient to fix a liability on the defendant. But the employment must come within the scope of his implied authority.

The complaint alleging that the plaintiff was injured while acting in the employment and capacity of brakeman, and there

Facts insufficient to show employment. being no pretense that he was expressly employed in such capacity by any officer or agent of defendant other than the conductor, the question is, was he ordered by the conductor to act in the capacity of

brakeman, under circumstances and in a mode which rendered his employment binding on the defendant? The plaintiff was the only witness examined on his part as to the

employment and the circumstances of the injury. His evidence clearly shows that he was employed as night-watchman, and placed at a station called "Patton Mines;" that, by the permission of the superintendent, he was in the habit of going to Millport, where his father resided, about 50 miles distant, to get his meals; and that he voluntarily entered the train at Patton Mines, without any order or request of the conductor, to go to Millport. The plaintiff was on the train of his own accord, and going down the road for his individual purposes. It is true he testifies, generally, that he was ordered by the conductor at Berry Station to brake for a sick brakeman; but this general statement is qualified or explained by his narrative of the occasion and circumstances, and by the words of the order, which clearly show its nature, extent, and purpose. When the train reached Berry Station, which was about ten miles from Patton Mines, the conductor had three coal cars taken out, in order to get a box car loaded with cotton. He was standing on the box car, and addressed the plaintiff as follows: "Will, come here, and make this coupling for me;" and the plaintiff was injured in conforming to this order or request. So far as the evidence set forth in the present record goes, this is the first and only order or request made by the conductor, and on this the plaintiff bases his claim of employment as a brakeman. When this case was before us on the former appeal, the complaint contained a fourth count, a demurrer to which had been overruled. This count seems to have been stricken out or omitted after the remandment of the cause, but it alleged the facts substantially as now shown by the evidence. We then held that the court did not set forth a legal cause of action, and that the demurrer should have been sustained. Referring to the order of the conductor at Berry Station to make a coupling, it is said: "Such order or direction, as averred, is entirely without the routine of the conductor's duties, and could not, by its abuse, fasten a liability on the railroad corporation." If a demurrer to a complaint should be sustained on the ground that it fails to set forth a legal cause of action, a demurrer to evidence, which only proves substantially the same cause of action, should be sustained. More is essential than a mere order or request to couple cars at one time and place, or doing a single act to constitute an employment within the scope of the implied authority of the conductor. It must be to render service to some extent continuous in its nature. On the case made by the complaint, it is incumbent on the plaintiff to show that he left his regular employment at Patton Mines to act as brakeman on a trip down the road by order or request of the conductor, or while on the train was employed by him to render service as brakeman on the trip in place of a sick or missing brakeman. This the evidence dis-

proves. On the testimony of the plaintiff himself, he has failed to show, *prima facie*, a lawful and binding employment which brought him under the control of the conductor, or subjected him to his orders. If he had previously acted as brakeman, it was of his own volition. He occupied at Berry Station merely the position of a passenger or bystander, who attempted to make the coupling at the request of the conductor as matter of accommodation. The evidence, as now shown by the bill of exceptions, which differs in material respects from the testimony on the first trial, does not entitle the plaintiff to recover on either count of the complaint.

Reversed and remanded.

Power of Conductor to Employ Brakeman in Case of Emergency.—See Sloan v. Cent. Iowa R. Co. (Iowa), 11 Am. & Eng. R. Cas. 145.

EAST LINE AND RED RIVER R. CO.

v.

SCOTT.

(Texas Supreme Court, November 20, 1888.)

Action for Damages—Compromise—Authority of Attorney.—In an action for damages for breach of a contract to employ the plaintiff, evidence that the defendant's attorney agreed to a compromise judgment in a suit at plaintiff's instance; that the judgment was paid by defendant; and that the attorney had charge of other suits arising out of the same accident, and endeavored to compromise them, is sufficient to warrant the jury in finding that he had authority to make the compromise upon which the action is founded and, as part thereof, to agree to give the plaintiff employment.

Injuries to Servant—Action—Compromise—Consideration.—The compromise of an action by a railroad employee to recover damages for personal injuries is sufficient consideration to support an agreement by the company to employ the plaintiff.

Same—Validity—Mutuality of Contract.—When, by the terms of such compromise, the company binds itself to employ the plaintiff and it is optional with the latter to serve, there is no mutuality of contract until the plaintiff exercises the right to fix the period for which he will serve, and, until he has done so, there is no breach for which he can maintain an action.

Same—Statute of Frauds.—Such contract, being capable of performance within a year, need not, under the Statute of Frauds, be reduced to writing.

Same—Performance—Effect of Delay.—If the plaintiff seeks employment under the contract as soon as he has recovered from his injuries, the fact that two years have elapsed from the making of the contract will not relieve the company from the obligation to employ him.

Same—Verbal Compromise—Judgment—Parol Testimony.—When the agreement for the compromise of a suit was oral, and a judgment entered

in pursuance thereof does not undertake to embody it, or even to recite it, one of the parties may, by parol evidence, show that obligations not embodied in the judgment were entered into by the other.

APPEAL from District Court, Marion County.

Action by William F. Scott against the East Line and Red River R. Co. to recover damages for breach of a contract to employ the plaintiff. The jury returned a verdict for the plaintiff, and defendant appeals.

F. H. Prendergast for appellant.

C. A. Culberson and *H. McKay* for appellee.

STAYTON, C. J.—The general nature and result of this action are thus stated in the brief of counsel for appellant :

“On November 10, 1886, W. F. Scott filed suit in the district court of Marion county against appellant, alleging that he was injured by the appellant in 1882 ; that he filed suit for damages, which was compromised in 1884 by the railroad paying him \$4500, and agreeing to employ Scott as engineer so long as he desired to be employed ; that they paid the \$4500, but when Scott applied for employment on July 1, 1886, they refused to employ him. Defendant denies the agreement, and says if any such agreement was made with Campbell & Taylor they had no authority to make it ; that the agreement was void because not in writing, and not to be performed in a year ; the agreement was contrary to public policy, and was not incorporated in the judgment which contained the settlement in 1884, and was not mutually binding on both parties, and indefinite. January 14, 1888, judgment for \$2400 for plaintiff. Defendant appealed.”

Facts.

The petition alleges so much of the compromise agreement as affects the case before us, as follows: It was further agreed “that the said company would thereafter employ plaintiff when this plaintiff should ask for and accept service and employment by the said company in the running and operating its said railroad in the employment of locomotive engineer,—that then being, and still is, the trade, occupation, and profession of your petitioner,—for whatever length of time of which your petitioner might desire to retain such employment, and at the reasonable and customary pay and wages of such employee on railroads, which then was and still is from one hundred to one hundred and fifty dollars per month, which settlement and compromise your petitioner did then and there accept in full satisfaction and settlement of all his claim for damages.” The petition then alleges that appellee prepared about July 1, 1886, to enter appellant’s service as contemplated by the compromise agreement, but that appellant refused to receive his services, or pay for them, and then proceeds as

Allegations as to compromise.

follows: "That the said services and the wages therefor are and would be worth to your petitioner the sum of, to wit, one hundred and fifty dollars per month from the first day of July, 1886, for a reasonable period of about the next ten years; that plaintiff is now a man of about thirty-six years of age, and has reasonable expectation of living and exercising his said trade and profession for the next ten years; and so plaintiff says that he has been damaged by said company in the sum of, to wit, twenty thousand dollars, wherefore," etc.

The evidence offered for appellee was sufficient to show, if uncontroverted, that E. W. Taylor, who may have been assistant secretary for the company, and Col. Campbell, an attorney, representing the company in the defence of that case,

Evidence. may have made an agreement at the time of and as a part of the compromise looking to the future employment of appellee. The statement of appellee in regard to that is: "I finally told them I would take \$4500 if they would give me a job on the defendant's road; that is, that they would give me the position of locomotive engineer on the road, such as I had, for life. I told Col. Campbell that I wanted it fixed up so that I could not be fired,—meaning that they could not discharge me. He answered that he did not know so much about that. I told him he could fix it that way, and he finally said, 'All right, let it go that way,' and the contract as above stated was agreed upon." Another witness who was present stated that the agreement was "that the road would pay \$4500, and give plaintiff a position of engineer for life." The testimony of appellee as to his application for employment is that "about June 28, 1886, I applied to Col. E. W. Taylor for work on the road under the contract, and told him I was ready to go to work." He then states that Taylor gave him a letter of recommendation to the company's master mechanic, who referred him to Mr. Clark, his superior in authority, whose business it was to employ engineers. In reference to his interview with Clark he states: "I then saw Clark about it, stating what I wanted, and my case. He says to me: 'You had a suit against the company, didn't you?' I told him I did. He said: 'I have no place for you.' I then told him 'Good morning,' and left. . . . I would have taken the position of engineer for life, and I supposed I had an expectation of living perhaps ten years."

The appellant asked the court to instruct the jury that, "there being no proof before you that Campbell had any other authority than as the attorney for defendant, you are charged that an attorney would not have authority to make the contract sued on, merely because he was attorney. Therefore the contract made by Campbell cannot bind the company." This charge was refused, and correctly so, if there was any evidence tending to

show with reasonable certainty that Campbell had authority to make the compromise. That he did agree to a compromise judgment which the appellant recognized and satisfied, is rendered clear by the evidence before us. The jury might look to this, although it is not directly shown that he had authority to make that part of the agreement not carried into the judgment, as tending to show that he had authority to make a compromise. Col. Campbell was not alive at the time of the trial, and his testimony seems not to have been taken. While an attorney, by virtue of his employment, has not authority to make a compromise of an action he is employed to prosecute or defend, it is not to be presumed when one so situated assumes the right to exercise such a power, and does exercise it, that this was done without lawful authority, and but slight evidence, in such a case, may be sufficient to authorize the belief that he was clothed with all the power he assumed to exercise. That Col. Campbell agreed to the compromise judgment is not controverted. His power to do that is not questioned, though the manner in which it was conferred is not shown. He reported the compromise judgment, and those who seem to have had general control of the litigation of the company found no fault with his action, but approved it for payment, and the company satisfied it. The inference from the evidence is very strong that in reference to the persons who were injured at the same time appellee was,—of whom there were many,—Col. Campbell may have been given all the power he assumed to exercise. E. W. Taylor testified “that when plaintiff was injured, on August 7, 1882, on the road, many others were also injured, and several were killed. Witness, as agent and interested party, had endeavored to settle and compromise the cases. Col. Campbell represented the defendant in all the cases. The Scott, Harper, Rosser, Tetro, and other cases, and all of them except those of Harper and Tetro, had been settled by Campbell and the witness. Witness and Campbell also had endeavored to compromise the Harper and Tetro cases for defendant, but without success.” In view of all these facts we are of the opinion that there was evidence from which the jury might fairly find that Col. Campbell had power to make the compromise, and although there was evidence tending to show to the contrary, it was not error to refuse the instruction asked.

Authority of
attorney to
compromise
action.

Appellant asked another, a charge which the court refused, and that was: “There being no evidence nor pleadings before you that plaintiff was bound by the contract sued on, nor that he agreed to be bound by it, there was therefore a want of mutuality in the contract, and defendant is not bound by it.” Reciprocal promises, made at the same time, and in relation to an agreement furnished, the one

Mutuality of
contract.

for the other, consideration to support a contract, and, if the appellee was relying on such a consideration to sustain the contract, he would fail, for there is no pretense that he promised to render any services whatever for the appellant. On the contrary, his petition shows that it was optional with himself whether he served the appellant. The contract alleged, however, does not rest on such a consideration. The asserted compromise of the pending action, whereby the appellee agreed to accept the judgment rendered and the promise made in satisfaction of his claim for damages, was the consideration on which the contract may well stand. The consideration was sufficient, and the absence of a promise by the appellee to serve is a matter of no importance, except as it may bear on the question whether the contract was sufficiently certain. The promise alleged contained two propositions: (1) That appellant would employ appellee as a locomotive engineer; (2) that for such services as he should render it would pay to him the compensation usual in such employment. The promise to do these things being binding, had the appellee rendered services in accordance with the contract, he would have been entitled to receive compensation therefor under the contract, and not upon an implied contract. That would be but the ordinary case of a promise by one person to pay to another money when he shall have performed some specified service, which, when done, the contract is held to be executed on one side, the consideration for the promise paid or given, and the contract complete. The charge referred to was not applicable to the case made by the pleadings or proof, and was therefore correctly refused.

The following charge was also asked: "The jury are charged that if there is no pleading nor proof that the contract sued on was for service for any definite period of time, and no evidence that plaintiff ever offered to be bound to work for any definite period of time, then the contract is indefinite, and plaintiff can not recover." This charge was refused. Whether the contract

Certainty of contract.

was sufficiently certain as to the period of time appellee should render services for appellant was also raised by the motion for new trial. The petition does not aver that appellant ever contracted to employ appellee for any definite period of time, but distinctly alleges that it did promise to give him employment "for whatever length of time which your petitioner might desire to retain such employment." The petition also alleges that appellee, "about the 1st day of July, 1886, applied to said company for employment, he then having sufficiently recovered from his said injuries," and it then gives an estimate of the value of the services of appellee for a period of 10 years, following the date mentioned; but it nowhere alleges that appellee agreed to serve appellant for any fixed

period of time. The evidence tends to show that the promise made on compromise was to give to appellee employment during his life, but it does not show that when appellee sought employment he proposed to render service for any named period, or so long as he might live and be able to perform the services contemplated. We must take the contract as alleged in the petition to be the contract on which appellee must recover, if at all, and, looking to that, there can be no doubt that whether appellee should serve appellant, and the term of such service, depended upon his own will. It is very generally, if not uniformly, held, when the term of service is left to the discretion of either party, or the term left indefinite, or determinable by either party, that either may put an end to it at will, and so without cause. *Harper v. Hassard*, 113 Mass. 187; *Coffin v. Landis*, 46 Pa. St. 431; *Wood, Mast. & Serv.* 133, 136, and citations. When such a state of agreement exists, it is no breach of contract to refuse to receive further services, and a refusal to accept any at all, it would seem, at most would entitle the engaged servant only to nominal damages. If the pleadings of appellee be accepted as true there can be no doubt that there was an agreement that appellant would give employment to appellee, but as the period for which this should be done was dependent on the will of appellee, to be exercised in the future, there was no contract binding appellant to employ appellee for any fixed period; the minds of the parties had not met as to a material element of the contract to which the agreement looked,—the period of service.

We are of opinion, however, while this is true, that the agreement made conferred on appellee the right to fix the period for which he would serve; and that, if he had done so when he demanded employment, he would be entitled to recover for the breach of the contract, which would have been thus completed and made certain by the exercise and expression of his will, which, for a valuable consideration paid, he had acquired the right to exercise for this very purpose. It was optional with appellee, when the agreement was made, whether he would serve appellant or not, but by the terms of the agreement he was given the right to fix the period he would serve, if he willed to serve at all. The right to this option could not be sustained on the theory of reciprocal promises as the consideration, for, as we have seen, the appellee, at the time of the agreement, made no express promise to serve, and no implied promise to that effect arises from the agreement; but the consideration, to which we have before referred, was sufficient to support the promise of appellant to permit appellee to fix the period of service, and to have employment during that time, subject, however, to lose the right for inability to discharge the duties of the employment or by mis-

Right of plaintiff to fix term of service.

conduct. If, when appellee sought to enter the service of appellant, he had fixed the period for which he would serve, there would have been a complete contract, certain in its terms, by which both parties would have been bound.

In *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 241, it appeared that the railway company, by letter, offered to receive and transport from New York to Chicago railroad iron, not to exceed a certain number of tons, during months specified, at a given rate per ton, and the party to whom the letter was directed merely assented to the proposal, but did not agree to deliver any iron for transportation, and it was held that there was no contract binding on either party, for want of mutuality. The action was brought by the person to whom the offer was made, and, while holding, as above stated, the court said: "Had there been a consideration given to the defendant for such option, the defendant would have been bound to transport for the plaintiff such iron as it required, within the time and quantity specified; the plaintiff having its election not to require the transportation of any." "There can be no doubt but that a contract may be so made as to be optional on one of the parties, and obligatory on the other, or obligatory at the election of one of them," is the declaration of the supreme court of New York. *Giles v. Bradley*, 2 Johns. Cas. 253. We need not go so far as to adopt the entire proposition, but the last branch of it is doubtless correct in all cases in which the option to make an agreement obligatory is supported by valuable consideration.

The case of *Bolles v. Sachs*, 37 Minn. 315, decided by the supreme court of Minnesota, involved a contract for service supported by consideration other than mutuality of contract, which was wanting in that the period the plaintiff was to serve was not fixed by the agreement. The defendants having declined to keep the plaintiff in their service, he brought an action for damages, and recovered \$1100. In disposing of the case the court said: "The contract was, perhaps, effectual to give to the plaintiff the option to himself fix the duration of it; but unless he exercised that election, and actually determined the period, so to make certain that which by the terms of the contract was uncertain, he could recover only for the period of his actual service. . . . It is self-evident that courts can neither specifically enforce contracts, nor award substantial damages for their breach, when they are wanting in certainty. Damages cannot be measured for the breach of an obligation when the nature and extent of the obligation is unknown, being neither certain nor capable of being made certain. It does not appear that the plaintiff ever determined that he would continue in this business for any definite period, or that he declared his election in this respect.

Had he not been discharged, he might, at will, at any time, after making the contract, have himself abandoned the employment, because of dissatisfaction, or for any other reason. Since the period of his service was thus left to depend upon his mere volition, and never became fixed, it cannot be assumed that he would have voluntarily remained in this employment up to the time of trial,—more than a year,—so as to justify an assessment of damages on that theory. Perhaps the defendants could not, by abruptly breaking the contract, by discharging the plaintiff, deprive him of the right to exercise his option to fix a definite and reasonable period of service. But, though he might have exercised and declared his election, even when he was notified of his discharge, and by then tendering performance under the terms thus reduced to certainty have placed himself in a position to recover damages measured with reference to the terms of the contract thus fixed, he does not appear to have done so." This seems to us correct, if we do not lose sight of the fact that there is no binding contract for service for a future period until the term of its duration is fixed, while there may be a contract, if supported by a sufficient consideration, which will give the right to one party to make the contract for service complete, by fixing the term during which it becomes obligatory on the one to serve and the other to accept and pay for the services. It is urged, however, by appellee that he did fix the period of service; that he elected to serve for life. He does not say so in his evidence. He states that such was the agreement at the time the compromise was made, but this is inconsistent with his pleadings. He does, in effect, say that by reason of the contract he demanded employment, but does not say that he elected to serve or declared an intention to serve during life, or for any other period certain, or that can be made certain. We are of the opinion that a new trial should have been granted on the ground that we have mentioned, and that a charge upon that subject embodying the views herein expressed, should have been given.

It is urged that the contract set up was invalid under the statute of frauds. If the contract be as alleged in the pleadings or as stated in the evidence, we are of the opinion that it is not subject to the objection urged against it. *Thouvenin v. Lea*, 26 Tex. 615; *Thomas v. Hammond*, 47 Tex. 52; *Bish. Cont. §§ 1237-1281*; *Wood, St. Frauds, §§ 270-272*.

Statute of
Frauds.

In either event the contract might be performed within one year, and the performance complete within the time, intent, and understanding of the parties. It was more than two years from the time the compromise agreement was made until appellee sought service, and it is urged that this delay relieved appellant from obligation to employ, if it ever existed.

The evidence shows that appellee sought employment as soon as he recovered from the injuries under which he was suffering at the time the compromise was made, sufficiently to be able to discharge the duties of the employment. Any agreement made must have been made in view of the fact that appellee was disabled at the time by his wounds, and with no expectation that he would resume labor until he could sufficiently recover from them to discharge the duties of engineer.

It is claimed that the court erred in permitting witnesses to state any contract or agreement other than that involved in the judgment; and the ground of this objection is that such evidence tended to vary the effect of the judgment. The agreement of the parties for compromise was oral, and the judgment rendered does not undertake to embody it, nor does it even recite that it was rendered in accordance with an agreement. The question is decided adversely to appellant in *Thomas v. Hammond*, 47 Tex. 52. For the errors noticed, the judgment will be reversed, and the cause remanded.

Servant—Claim to Compensation—Evidence of Employment.—In an action against a railroad company to recover for work and labor performed, it appeared that the plaintiff was acquainted with the civil engineer of the company and had worked as a grader during the construction of the road. Before a depot was built, plaintiff told the civil engineer that he would like to get a situation with the company. Some time after this, there was some freight on the steps of the freight-house, and the engineer told plaintiff to see to delivering it and to look after things. No authority on the part of the engineer to employ the plaintiff was shown. When the station-agent was appointed, plaintiff told him that he had been there attending to freight and expected a situation. The agent did not agree to employ him, but said that if the company allowed him anybody, he wanted the plaintiff to remain. Plaintiff built the fires, and put the station and freight-house in order and handled the freight. When the pay car came along, plaintiff applied for payment for his service which was refused. There was no evidence that the superintendent knew that the plaintiff was performing work for the company, and the station-agent testified that he informed plaintiff that the company refused to allow him an assistant, as the business did not warrant it. *Held*, that the plaintiff had no cause of action against the company for the services rendered. *Held*, also, that it was error to instruct the jury that if plaintiff did work which must necessarily be done and which the station-agent could not do himself, he had authority to employ plaintiff and the latter might recover, the question of the superintendent's assent to the employment not being submitted. *Willis v. Toledo, A. A. & N. M. R. Co.* (Mich.), 40 N. W. Rep. 205.

CINCINNATI, INDIANAPOLIS, ST. LOUIS AND CHICAGO R. CO.

v.

LANG.

(Indiana Supreme Court, May 7, 1889.)

Injuries to Servants—Section Hand—Wild Train—Risks Assumed.—In an action to recover damages for the death of plaintiff's intestate, it was alleged that the deceased was sent out upon a hand car along with other section hands to repair the track; that when the hand-car was running round a curve, a wild train, of which no notice had been given to the foreman, came along at the rate of fifty miles an hour; that the plaintiff had only time to alight, when the train struck the hand-car and threw it against him, inflicting fatal injuries. *Held*, that the complaint stated a cause of action, the intestate being assigned to a special duty by a special order, and bound to anticipate peril only from regular trains and not from wild trains.

Same—Rule of Company—Special Trains.—The evidence adduced upon the trial showed that the railroad company had promulgated a rule requiring section men to be prepared at all times for special or irregular trains, and that the intestate, was injured at a place beyond the point to which the section men directed him to go. *Held*, that the deceased by taking employment of the company became bound by the regulation, and assumed the risk arising from the running of the wild train.

APPEAL from Circuit Court, Dearborn County.

Action against the Cincinnati, Indianapolis, St. Louis & Chicago R. Co. to recover damages for negligently causing the death of the plaintiff's intestate, Nicholas Lang, a section-man in the employment of the defendant.

The defendant appeals from a judgment for the plaintiff.

Haynes & Thompson for appellant.

John S. Scobey for appellee.

ELLIOTT, C.J.—The material allegations of the appellee's complaint are these: That, her intestate, Jacob Lang, was in the service of the appellant as a section hand on the 14th day of December, 1884, and had then been in its service for twelve months; that the foreman under whom he worked was Nicholas Lang; that on Sunday, the 14th day of December, 1884, the appellant directed its section foreman, Nicholas Lang, to take his crew of hands and repair a part of its track not far from the town of Weisburg, and that, pursuant to the order, the foreman caused his crew, of which the deceased was one, to get upon a hand-car, and proceed to the place indicated; that the hand-car was operated with due care

and caution, and was run in a safe and prudent manner; that on Sunday, the 14th day of December, the day on which the foreman, Nicholas Lang, was directed to make repairs, the appellant sent out upon its railroad from Indianapolis a locomotive and car destined to the city of Cincinnati, and that it neglected to give any notice that the engine and car had been sent out upon the road; that the crew of the hand-car, in charge of Foreman Lang, when near a short curve, were suddenly met by the engine and car approaching from the opposite direction; that the engine and car were running at the rate of fifty miles an hour; that, upon seeing the engine and car approaching, Foreman Lang and his crew stopped the hand-car as soon as it was possible to do so, and the intestate at once alighted from it; that the engine struck the hand-car, and threw it against him, and so injured him as to cause his death within two hours; that no whistle was sounded or other signal given by the engineer; that by reason of the curve in the track the approach of the engine and car could not be seen in time to escape collision; that the intestate, by the use of the utmost diligence and care, could no more than alight from the hand-car near the side of the track, where he was when the hand-car was thrown upon him; that the locomotive and car composed a wild or irregular train, running without a time-table, and at the pleasure of those controlling it; that it was the duty of the defendant to have given information of the wild train to the foreman and men composing the hand-car crew; that the persons operating that train and the train despatcher were incompetent, and that the defendant was guilty of negligence in employing and in retaining them; that the injury to the intestate was caused by the negligence of the defendant, and without fault on his part.

The complaint states a cause of action. The appellant, by special order, directed the intestate to go to a designated place, and there perform service in the line of his duty, and the appellant did not, by notice, rules, or instructions, make any provisions for his safety while obeying its orders. It was bound to know the nature of the service it had ordered him to perform, the place where it was required to be performed, and, with this knowledge, it had no right to put him in peril by sending out an irregular train, without in some way giving notice that the train had been sent out, or by so regulating its speed and management as to prevent injury to those engaged in the service required of them by the special order. By the order of the appellant, the special duty in which the intestate was engaged was enjoined upon him, and, having thus required him to perform the duty, it had no right to send over its road a train which the employees engaged as was the intestate had no reason to

Section hands
on special duty
not bound to
anticipate
wild trains.

expect would make obedience to the special order unusually perilous. It may be true that the intestate was bound to know of the danger from regular trains running according to the timetables or rules, and yet not be true that he was bound to know that a wild or irregular train would be run over the road, and so run as to bring about a collision. The peril from the wild train he was not bound to anticipate, for the reason that, from the assurance impliedly contained in the special order assigning a designated duty to him, he had a right to assume, in the absence of countervailing facts, that if he himself exercised care and diligence the company would not send out a wild train without exercising ordinary care and diligence to prevent injury to him while travelling in the usual way to the place where he was called by the duty assigned him, and while performing that duty at the place designated. It cannot be justly asserted, under the averments of the complaint, that the danger to which the company exposed him was one of the ordinary risks of the service which he assumed. In affirming that the facts stated in the complaint constitute a cause of action, we do not depart from the general rule that the employee assumes the ordinary risks incident to his services, declared in *Indianapolis & St. L. R. Co. v. Watson*, 114 Ind. 20; 33 Am. & Eng. R. Cas. 334; *Louisville, N. A. & C. R. Co. v. Sanford*, 117 Ind. 265, and many other cases. What we decide is that the facts stated in the complaint make a case belonging to a different class; for as the intestate was assigned to a special duty by a special order, and it does not appear that there were any rules requiring section men to guard against irregular trains, nor any care taken, either by regulating the speed of the wild train, or by notice to provide for his safety, and it does appear that he was himself entirely without fault, the peril he was subjected to from the irregular train cannot be regarded as one of the ordinary risks incident to the service he had entered. On the admitted facts, there is a *prima facie* case against the appellant. *Cincinnati, I., St. L. & C. R. Co. v. Long*, 112 Ind. 166, 31 Am. & Eng. R. Cas. 138; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Haley v. Case*, 142 Mass. 316; *Goodfellow v. Boston, H. & E. R. Co.*, 106 Mass. 461; *Crowley v. Burlington, C. R. & N. R. Co.*, 65 Iowa, 658, 18 Am. & Eng. R. Cas. 56; *Abel v. Delaware & H. Canal Co.*, 103 N. Y. 581, 28 Am. & Eng. R. Cas. 497; *Regan v. St. Louis, K. & N. W. R. Co.*, 6 S. W. Rep. 371; *Lewis v. Selfert*, 11 Atl. Rep. 514.

The duty of providing for the safety of employees rests on the employer, and cannot be delegated. In this instance the duty of exercising reasonable care to prevent injury to the intestate while going to the place where he was ordered, and providing for his security, rested upon the appellant. It was therefore the

duty of the master that was neglected, and it was this neglect of duty, and not that of a fellow-servant, which caused Jacob Lang to lose his life. Louisville, N. A. & C. R. Co. v. Buck, 116 Ind. 566; Louisville, N. A. & C. R. Co. v. Sanford, 117 Ind. 265; Indianapolis & St. L. R. Co. v. Watson, *supra*; Krueger v. Louisville, N. A. & C. R. Co., 111 Ind. 51, 31 Am. & Eng. R. Cas. 329; Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 31 Am. & Eng. R. Cas. 149; Indiana Car Co. v. Parker, 100 Ind. 181; Franklin v. Winona & St. P. R. Co., 27 Minn. 409, 31 Am. & Eng. R. Cas. 211.

If the master's negligence is the principal cause of the injury, then he will not be absolved from liability, although the negligence of a fellow-servant may have occurred in causing the injury; so that, if it were true that the negligence that caused the collision was in part that of the persons in charge of the wild train, even then the appellant, under the case made by the complaint, would be liable. This conclusion is well fortified by authority. Franklin v. Winona & St. P. R. Co., *supra*; Faren v. Sellers, 39 La. Ann. 1011; Cayzer v. Taylor, 10 Gray, 274; Paulmier v. Erie R. Co., 34 N. J. Law, 151; Booth v. Boston & A. R. Co., 73 N. Y. 38.

The material questions presented by a motion for a new trial are radically different from those presented by the demurrer to the complaint. The application of settled principles of law to the evidence makes it necessary for us to declare that the verdict and judgment cannot be sustained. This conclusion is forced upon us by the evidence, which shows, and this without contradiction or conflict, that the appellant had promulgated rules for the government of its employees, and that Jacob Lang was injured at a place beyond the point to which the special order directed him to go. We have not examined the evidence to ascertain whether the appellant's contention upon other points than those mentioned is just, for this we deem it not proper to do, as the conclusion we have reached upon the points named is fatal to the judgment. One of the rules of the company contained a provision requiring section men "to be prepared at all times for special or irregular trains." This provision not only imparted to the employees notice that irregular trains might at any time be sent over the road, but it also required employees to be at all times prepared for such trains. Jacob Lang, in taking service with the appellant, became bound by the rule; for it is the duty of the railroad company to make rules, and of those in its service to obey them. Pennsylvania Co. v. Whitcomb, *supra*. He was therefore bound not to enter a curve, where an irregular train might come upon him, without taking precautions to discover

Duty of company to provide for servant's safety.

Section-hand on special duty only protected while engaged therein.

its approach, and avoid a collision. Obedience to the rules of a railroad company is, as a matter of law, and of high public policy, required from the employees, since without obedience those who travel by railroad would be subjected to greatly increased danger. Disobedience or disregard of rules is always a defence to an action by the servant against the master, unless there are facts which, in the particular instance, excuse the employee, or relieve him from the duty of strict obedience. We do not undertake to decide what facts will take a case out of the operation of the general principle which requires adherence to the rules promulgated by the employer, for our work is done when we affirm that in this instance there are no facts which relieved the employee from the operation of the general principle. Conceding, but not deciding, that the special order did relieve him from the operation of this general principle, and did warrant him in assuming that the rule of the company requiring employees to be at all times prepared for irregular trains was suspended for the time, still the utmost that can be concluded from this concession is that the protecting effect of the special order did not extend beyond the place it designated. The effect of the special order, conceding all that can with any plausibility be claimed for it, is completely nullified by the fact that the collision occurred at a place beyond that specified in the order. It cannot be asserted with any trace of reason that the order led the intestate to presume that the track was safe beyond the place designated in the order itself, even if so much force can be conceded to it. When the hand-car was taken beyond that place, the employees ceased to act under orders, and, in truth, were disobeying orders, so that it cannot be possible that the orders cast any protection upon them, or longer gave them any assurance which imposed liability upon their employer. We are unwilling to hold that a railroad company which has made and promulgated rules requiring its employees to be at all times prepared for irregular trains is bound to give special notice to the section men along the line as each irregular train is sent over the road. There may be cases where special notice is required, but such cases constitute exceptions to the general rule. It is undoubtedly true that the employer must always exercise ordinary care and diligence to secure the safety of employees, and it is probably true that cases may arise in which ordinary care would require notice to section men along the line of the road. But whatever may be the rule where special orders are adhered to, and the injury is received in executing them, it is quite clear that a section man injured while going over a part of the road not covered by the special order cannot successfully claim that the employer must respond in damages because he was not notified that a wild train was on the road, destined to a point which

would make it traverse the place designated in the special order. If the employee had been at the place so designated, we should have a very different case, and one that would require us to decide whether the circumstances were such as to make it the duty of the employer to give special notice. If there was negligence on the part of the section foreman and of those in charge of the special train, it was that of fellow-servants, and for such negligence the master is not liable. We have many decisions upon this question, and it cannot be regarded as open to discussion.

Judgment reversed, with instructions to award a new trial.

Injuries to Section-hands—Extra Trains.—When it is the practice of a railroad company, of which a section-hand has knowledge, to run extra trains without notice, and it is the duty of one of the gang to be always on the lookout therefor, the section-hand assumes the risk of accidents from the running of such trains. *Pennsylvania R. Co. v. Wachter*, 60 Md. 395; 15 Am. & Eng. R. R. Cas. 187; *International & G. N. R. Co. v. Hester (Tex.)*, 21 Am. & Eng. R. Cas. 535; *Olsen v. St. Paul, M. & M. R. Co. (Minn.)*, 33 Ib. 386. The service contracted to be performed by a section-hand is of such a nature as to embrace within its scope dark and cloudy as well as clear weather; and he assumes the risk of accident arising therefrom. *International & G. N. R. Co. v. Hester (Tex.)*, 21 Am. & Eng. R. Cas. 535. Where a section-hand voluntarily and without protest mounts a hand-car and rides upon it, and he has the same opportunities for ascertaining the whereabouts of a belated train as the foreman of a gang, the railroad company is not liable for injuries resulting in his death. *Railway Co. v. Leech*, 41 Ohio St. 388. So too, where the deceased rode upon a hand-car knowing that flags had not been sent out in advance or other precautions taken, and had knowledge of a rule permitting the despatch of special trains without signalling in advance, he accepted the risk of such unsignalled special train and no recovery could be had. *McGrath's Adm'r v. New York & N. E. R. Co.*, 14 R. I. 357.

In Massachusetts, where the courts hold that section-men are fellow-servants of the section-boss and the engineers of special trains, no recovery can be had for personal injuries caused by a collision between a hand-car and a locomotive, if the accident was occasioned by the negligence of the section-boss and the engineer. *Clifford v. Railroad Co.*, 141 Mass. 564. But in West Virginia, where it is held that a section-foreman is not the fellow-servant of a section-hand who is subject to his orders, the company is liable in damages for injuries caused through the negligence of the foreman in failing to avail himself of an opportunity for ascertaining when extra trains will be run. *Criswell v. Pittsburg, C. & St. L. R. Co. (W. Va.)*, 33 Am. & Eng. R. R. Cas. 232.

Assumption of Risks—Travelling Auditor—Incidental Dangers.—The travelling auditor of a railroad company, whose duties are to travel on the company's cars from station to station on its roads and audit accounts, is a servant of the company and assumes the ordinary risks incident to the employment. Where such servant is injured in an accident resulting in the derailment of the car on which he is riding, it will be presumed until the contrary is shown, that the company was not in fault in providing suitable instrumentalities for the business, and had no notice of any defect or other cause of the accident. Before the servant can recover he must show that the injury did not arise from a defect obvious to himself, or which, by the exercise of ordinary care, he might have known. He must

show it was not from hazard incident to the business. *Minty v. Union Pac. R. Co.* (Idaho), 21 Pac. Rep. 660. The court said:

"A point is made by the defendant that the plaintiff at the time of the accident was riding on a pass, which had conditions that in case of injury to the holder would protect the defendant from liability. The effect of such a provision upon a pass is not, under the evidence, a question in this case. The pass was apparently adopted by both parties as a convenient way to carry out a contract of employment. The terms of that pass were no part of that agreement. Its object was only to enable the plaintiff, by its means, to pass over the road. The agreement was that the plaintiff should serve the defendant as its travelling auditor; go from station to station on this and other lines of road, upon the cars of defendant, without charge to the plaintiff; for which he was to have an agreed compensation. With or without the pass he was to do, and would have done, so far as appears, precisely what he was doing at the time of the accident. He was a servant of the company, on duty in the defendant's business, and riding upon or under his contract of employment, but of which contract neither the pass nor its conditions were a part. The relations between the parties were those of master and servant, and the only rule of the liability of the defendant to the plaintiff is the rule of the liability of the employer to the employee. That rule is "that when a servant enters into the employ of another he assumes all the risks ordinarily incident to the business. He is presumed to have contracted with reference to all the hazards and risks ordinarily incident to the employment" and he cannot recover for injuries resulting from such ordinary risks." *Wood, Mast. & Serv.* § 326; *Noyes v. Smith*, 28 Vt. 59. The servant seeking to recover for an injury takes the burden upon himself of establishing negligence on the part of the master, and due care on his own part; and he is met with two presumptions, both of which he must overcome, in order to entitle him to a recovery: First. That the master discharged his duty to him by providing suitable instrumentalities for the business; and this involves something more than proof of the mere fact that the injury resulted from a defect in those appliances. The burden is imposed on him of showing that the master had notice of the defect, or that, in the exercise of ordinary care, which he is bound to observe, he would have known it. Second. When this is established, he is met by another presumption, the force of which he must overcome, and that is that he assumes all the ordinary hazards of the business. To overcome this presumption he must show that the injury did not arise from an obvious defect in the instrumentalities of the business, or from hazard incident to the business, or from causes known by him to exist, or which he might have known by the exercise of ordinary care. Failing to overcome these presumptions, he cannot recover. *Wood, Mast. & Serv.* § 382, and cases cited. The jury in this case should have been so instructed, instead of being permitted to act upon the instruction given to them by the court. There was no evidence in the case to overcome either of these presumptions; and for this, as well as for the other reasons above stated, the judgment must be reversed."

Same—Fireman—"Bucking the Snow."—Where a fireman upon a locomotive engine, in discharge of his duty, with full knowledge of the nature and extent of the dangers of the service he is engaged in, or having the means of being informed of such facts and conditions by the exercise of ordinary care, voluntarily assumes such risks, and is thereby injured, and the employer is guilty of no laches or misconduct unknown to the servant, or which with ordinary care he might have known, he cannot recover for such injury. Where the deceased was a fireman upon an engine sent out for the special purpose of "bucking the snow" with a view to clearing

the track, *held*, that, as the company had no knowledge of any special danger arising therefrom at the place where the accident which caused the death of the deceased occurred, and the deceased himself was in the possession of all available means of information, a nonsuit ought to have been granted, or, at all events, the law as to the risk assumed by the employee should have been given to the jury. *Drake v. Union Pac. R. Co.* (Idaho), 21 Pac. Rep. 560.

Same—Gravel or Repair Train—Jerks.—When a gravel or repair train is managed as usual, and the jerk complained of is only such as would be expected to occur on a train of that character in doing its work, the employees engaged on it or attached to it take the risk as incident to the service, and if injured by the jerk, cannot recover of the company. *Central R. Co. v. Sims* (Ga.), 7 S. E. Rep. 176.

Same—Inadequate Fences.—A brakeman sued to recover damages for injuries received through being thrown from a train of cars by a collision of the train with an ox which had got upon the track through the negligence of the company in failing of maintain proper fences. It appeared from the testimony, including that of plaintiff's own witnesses, that the fences were so insufficient for the purpose of turning stock that any prudent man must have noticed the fact. *Held*, that the plaintiff could not recover, even though he testified that he was ignorant of the insufficiency of the fences. *Magee v. North Pac. Coast R. Co.* (Cal.), 20 Pac. Rep. 709; s. c., 21 Pac. Rep. 114.

Neither common nor statute law in Colorado requires a railroad company to fence its track to prevent cattle straying upon it, and damages cannot be recovered for the death of an engineer caused by stray cattle jumping on the track and derailing the engine. *Cowan v. Union Pac. R. Co.*, 35 Fed. Rep. 43.

Same—Unblocked Frogs—Continuance in Service.—By acceptance of the service and continuance therein for a period sufficient to make him acquainted with the nature of the appliances used, a switchman assumes the hazard of having his feet caught in unblocked frogs, and it must be presumed that the deceased was charged with notice of the manner and difficulty of relieving his feet when caught within the frog and of the danger of the situation in which he might then be placed. *Appel v. Buffalo, N. Y. & P. R. Co.* (N. Y.), 19 N. E. Rep. 93.

Same—Weighing Cars—Coupling.—Where an employee undertakes a hazardous employment, he is deemed to assume the risk so far as it is open to observation or known to him. Plaintiff was engaged in coupling cars after they had been "kicked" across the scales and weighed. He was injured by a car which, according to his testimony, came down at an unusual and dangerous rate of speed. *Held*, that in the absence of evidence to show that, with reasonable diligence, the cars could be "kicked" over the scales at a uniform and low rate of speed, he could not recover. *Woods v. St. Paul & D. R. Co.* (Minn.), 40 N. W. Rep. 510.

Plaintiff had been two days in the service of the defendant company as switchman in its yard, when, while engaged in coupling cars, his arm was crushed. The evidence showed that the injury was caused by his stepping into a cattle-guard when he was proceeding to couple two cars. The cattle-guard was situated near the scales where defendant weighed its cars, and the cars passed over it when pushed from the scales after they had been weighed. At the time of the accident, plaintiff was attempting to couple a car which had been weighed and sent along the track. The ends of the cars which he sought to couple were over the cattle-guard, and he stepped into it and fell. *Held*, that, although the plaintiff assumed the usual hazards of the service and such risks as were apparent to observation, the defendant was bound to use reasonable care in providing suit-

able means and appliances with a view to the safety of its employees, and that as the evidence permitted the jury to find that he had no knowledge of the cattle-guard, he was entitled to recover. *Fredenburg v. Northern Cent. R. Co.* (N. Y.), 21 N. E. Rep. 1049. The court said:

"When the plaintiff entered into the defendant's employment he assumed the usual hazards of the service and such risks as were apparent to observation. *Gibson v. Erie R. Co.*, 63 N. Y. 449. But the duty was with the defendant to use reasonable care in providing suitable means, appliances, and structures, with a view to the safety of its employees, and that they might not unnecessarily be exposed to danger of injury in the service. The use of cattle-guards is essentially proper for recognized purposes at some places on railroads. The question has relation to the location and situation of this one. It had been there for several years; and although it had been usual to couple over it cars as they came from the scales, no injury, so far as appears, had resulted from it. The fact that the location in question was the place where cars when weighed were commonly and habitually coupled, imposed upon the defendant the duty to use care to make that place reasonably safe for that service of its employees. The description given of this structure was such as to enable the jury to say that it was liable to put in danger of injury a person proceeding to couple cars there without the caution which knowledge of it would enable him to exercise; and, upon the evidence, the finding of the jury was warranted that the defendant, in permitting the cattle-guard to remain at that place in the condition which it was, had failed to perform its duty to its employees, and was chargeable with negligence. But that did not render the defendant liable to the plaintiff if the cattle-guard was obvious or known to him at the time in question. *De Forest v. Jewett*, 88 N. Y. 264, 8 Am. & Eng. R. Cas. 495; *Appel v. Buffalo, N. Y. & P. R. Co.*, 111 N. Y. 550. The occurrence was in the evening. It was then dark; and, although the plaintiff had a lighted lantern, the evidence permitted the jury to find that he had no knowledge, up to that time, of the cattle-guard, and that, without any negligence on his part, he did not observe it at the time he attempted to couple the cars upon the occasion when he received the injury. It is urged that the plaintiff was bound to make himself acquainted with the situation presented by the various structures about the yard, and their condition. It is quite true that his duty was to use due diligence,—to familiarize himself by observation with the structures, and their situation and condition, in the yard, with a view to his own safety in the performance of his duty, and for the protection of himself against injury. But his recent entrance into the service, and the fact that his duties hitherto had not called him to the place in question, enabled the jury to find that his failure to escape the injury was not attributable to any want of diligence on his part in that respect. The case seems to be within the doctrine of *Plank v. New York Cent. & H. R. R. Co.*, 60 N. Y. 607. The exception to the denial of the motion for nonsuit was therefore not well taken, and the questions of fact presented by the evidence were properly submitted to the jury."

Same—Brakeman—Defective Brake—Cattle-guards.—If a brakeman knows that a brake is defective and that many of the cattle-guards are dangerously near the track, he assumes the risk incident to being struck by a cattle-guard while stooping from the lowest step for the purpose of throwing off the brake by the use of an instrument which he took with him for the purpose. *Missouri Pac. R. Co. v. Somers (Tex.)*, 9 S. W. Rep. 741.

Same—Low Joints—Train Hands.—If it appears from the evidence that low joints are not uncommon on all roads, and that they are frequent on a road in wet weather, and are therefore to be expected by brakemen,

damages are not recoverable by a brakeman who is thrown off the train by an alleged low joint in the track, when it is not shown that any of the other employees felt any unusual jar, or that any defect was found in the track by the track inspectors. *Texas & N. O. R. Co. v. Dillard* (Tex.), 8 S. W. Rep. 113.

Same—Duty of Company and Employee—Defective Appliances.—It is the duty of railroad companies to use reasonable care in the selection and in furnishing to their employees implements and appliances with which the latter are to perform their duties. The duty is also upon such companies to use reasonable care to keep the implements in good and safe repair; but the servant assumes all risks to himself from the implements save those which flow from the negligence of the employer in the failure to perform his duty, and the servant is bound to use reasonable care in the performance of his duties for his own protection against hurts. But he is not bound to keep the implements or tools in repair, nor to search for and report defects, unless by contract between him and the master, or by the nature of the implements, that duty is devolved upon him. In an action by a porter to recover damages received through defects in a baggage truck, *held*, that it was not error to refuse an instruction that it was the plaintiff's duty under his employment to see that the truck in question was in a reasonably safe condition for use, the employee being charged only with knowledge of apparent defects, and with the usual effect of use and wear upon the truck and being under no obligation to inspect it for latent defects. It appeared that the defect in the truck could only have been found out by an inspection underneath it. *Held*, that the jury were justified in finding for the plaintiff, he having testified that he had no knowledge of the defect. *Missouri Pac. R. Co. v. Crenshaw* (Tex.), 9 S. W. Rep. 262.

Same—Boiler Pit—Cover.—It was the duty of the plaintiff on the morning of each day to remove from the pit under the boilers and furnaces the cinders and ashes that had accumulated during the previous day. To accomplish this, it was necessary for him to enter the pit, which was covered in front of the furnace and boiler by two loose plates of boiler iron about three feet wide and four feet long, and each weighing from two to three hundred pounds. The plates rested on a brick wall which was somewhat higher on one side than on the other. On the occasion when the injury was received, plaintiff had placed one of these plates on edge, and had propped it on the outside with a stick in no way secured, except by its contact with the smooth surface of the iron. While engaged in removing the cinders and ashes, the plate fell and injured him. Plaintiff had been engaged in the same duty about six weeks before he was injured, and had full opportunity to know of any defects that would render it dangerous to work in the pit with the covers secured in the manner in which it was shown he secured them. *Held*, that plaintiff could not recover. *Brown v. Brown* (Tex.), 9 S. W. Rep. 261.

Same—Dangerous Premises—Continued Use.—Where an employee is killed whilst working upon dangerous premises, and he knew the condition of the premises and continued to use them without objection, no recovery can be had against the employer under Kentucky Gen. Stat. c. 57, § 3, which provides that if the life of any person is lost by the wilful neglect of another person or corporation, punitive damages may be recovered therefor. *Needham v. Louisville & N. R. Co.* (Ky.), 11 S. W. Rep. 306.

Same—Push-poles—Use of Sockets.—There is no obligation upon the employer to adopt new inventions, his only duty being to furnish reasonable safe appliances for the use of his servants. Accordingly, where the evidence shows that the use of sockets attached to cars and tenders for the purpose of receiving "push-poles" for moving cars upon parallel tracks,

has not been generally adopted by railroads in the district, and the evidence leaves it doubtful whether the servant had any knowledge of the existence of such a device, the latter takes the risk of using the push-pole according to the customary manner. *Norfolk & W. R. Co. v. Jackson's Adm'n'r* (Va.), 8 S. E. Rep. 370. In this case the court said:

"It is admitted that the general and well-established rule is that he who enters the service of another, for the performance of specified duties, for compensation, takes upon himself the natural and ordinary risks incident to the performance of such duties. The law presumes that the employee voluntarily assumes these risks when he enters the service, and that his compensation is adjusted accordingly. Hence 'he cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid.' *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501. Nor, on the other hand, is it disputed that the rule does not relieve the employer of the obligation to exercise ordinary care in supplying and maintaining suitable and safe instrumentalities for the performance of the work required. The employee has the right to count on this duty, and he is not required to assume the risks of the negligence of the employer, or, what is the same thing, of those who stand in his place and represent him. The contract of service implies, in the absence of a stipulation to the contrary, that the employer will make adequate provision that no danger, other than the perils naturally incident to the business, shall inure to the employee in the course of the employment; and, if he fails in the performance of his duty in this particular, he is as liable to the employee as he would be to a stranger. But the obligation extends no further than to exercise ordinary care. *Wood, Mast. & Serv.* § 345; *Southwest Virginia Improvement Co. v. Smith's Adm'r*, 7 S. E. Rep. 365 (recently decided at Wytheville). The employer is not the guarantor of the employee's safety, and hence he is not bound, at his peril, to provide only the best and safest instrumentalities, and to use the best methods for their operation; nor does he impliedly warrant the fitness and soundness of his machinery and appliances. 2 *Ror. R. R.* 1212, note. If, in the exercise of ordinary care, he furnishes such as are reasonably safe and adequate, and keeps them so, that is all the employee can expect. The latter, likewise, must use ordinary care to avoid injuries to himself, and to entitle him to recover for defects in the appliances of the business he is ordinarily required to show, first, that the appliance in question was defective; secondly, that the employer knew, or ought to have known, of the defect; and thirdly, that the employee did not know of it, and that the injury complained of resulted in spite of ordinary care on his part; and the reason why he must establish the last, as well as the first two, of these propositions, is that the burden is on him to show that his case comes within an exception to the general rule above mentioned,—that is to say, that 'the injury did not arise from an obvious defect in the instrumentalities of the business, or from a hazard incident to the business, but from a cause . . . which strips his act of the imputation of negligence, and overcomes the presumption that he voluntarily took the risk upon himself.' *Wood, Mast. & Serv.* §§ 382, 414. The employer, however, is not bound to adopt every new improvement in appliance, nor is he liable to the employee for an injury on the ground merely that the injury would not have resulted if such new improvements had been adopted, provided the employee be not deceived as to the degree of danger that he incurs. 3 *Wood, Ry. Law.* § 378; *Darracutts v. Chesapeake & O. R. Co.*, 31 Am. & Eng. R. Cas. 157.

"It is also well settled that if an employee chooses to accept an employment which requires him to operate machinery defective from its construction, or from the want of repair, and with knowledge of the facts

enters the service, he cannot hold the employer liable for an injury within the scope of the danger which both the contracting parties contemplated as incident to the employment. And so, also, where the employee, after he enters the service, has notice of defects in the machinery he is required to operate, and thereafter continues in the service without any promise on the part of the employer to render the same less hazardous, he assumes these extra risks, and must bear the consequences; and the law presumes notice of those perils which are open and obvious, and which the employer has the opportunity to ascertain. Whart. Neg. § 206; *Stafford v. Chicago, B. & Q. R. Co.*, 114 Ill. 244.

"These principles are well illustrated by the case of *Dynen v. Leach*, 40 Eng. Law & Eq. 491. That was an action brought under Lord Campbell's act, to recover damages for the alleged negligent killing of the plaintiff's intestate. The defendant was a sugar-refiner, and had employed the deceased as a laborer. It was a part of the latter's duty to fill sugar-moulds, and to hoist them up to higher floors in the warehouse by means of machinery. The usual mode of attaching the moulds to the machine was by placing them in a sort of net-bag, which effectually prevented any accident; and this was the mode adopted by the defendant, until, from motives of economy, he substituted a kind of clip, which laid hold of the rim of the mould. The deceased, on the occasion in question, had himself filled the mould, and fastened it to the clip, but when it was being raised the clip, by some jerk, slipped off the mould, which fell on his head and killed him. Upon these facts the plaintiff was nonsuited, and this ruling was unanimously affirmed by the court of exchequer. Pollock, C. B., said: 'A servant cannot continue to use a machine he knows to be dangerous, at the risk of his employer.' Bramwell, B., was of the same opinion. He said: 'There is nothing legally wrongful in the use by an employer of works or machinery more or less dangerous to his workmen, or less safe than others that might be adopted. It may be inhuman to carry on his works, so as to expose his workmen to peril of their lives, but it does not create a right of action for an injury which it may occasion, when, as in this case, the workman has known all the facts, and is as well acquainted as the master with the nature of the machinery, and voluntarily uses it.' Channell, B., concurred. He said: 'If I were to speculate on the cause of the accident, I should be disposed to think that it was the careless fixing of the clip by the deceased himself. But we cannot speculate on that point; and I rest my judgment on the ground that the deceased himself continued in the employ of the defendant, and in the use of the clip, with full knowledge of all the circumstances, so that he directly contributed to the accident.'

"In the recent case of *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S. 189, 31 Am. & Eng. R. Cas. 216, the rule is very clearly announced by the supreme court of the United States. That, too, was an action for alleged negligence, resulting in the death of the plaintiff's intestate, who was a brakeman in the defendant's employ, and who, when killed, was engaged in coupling cars on a siding in the yards of the defendant company. The siding was a double-curve track, containing a very sharp curve, in consequence of which the draw-heads of the cars failed to meet, and passed each other, thus coming so close together that the deceased was crushed to death. The charge of negligence was that the cars were unsafe, and negligently constructed, in not being provided with bumpers or other means to prevent the incoming together in case the draw-heads passed each other, and that the curve was unskillfully and negligently constructed, with a curve so sharp as to permit the draw-heads of the cars to pass each other, whereby the deceased was killed without fault on his part. It was held, however, that the action was not maintainable. 'The deceased,' said the court, 'entered into the employment of the defendant as a brakeman in

the yard in question, with a full knowledge (actual or presumed) of all these things,—the form of the side tracks, the construction of the cars, and the hazards incident to the service. Of one of these hazards he was unfortunately the victim. The only conclusion to be reached from these undoubted facts is that he assumed the risks of the business, and his representative has no recourse for damages against the company.' The rule, it was said, which exempts the master from liability to the servant in such a case, is founded, not only upon an implied contract between the parties that the servant will assume the hazards usually incident to the service, and such also as are open and visible, but upon grounds of public policy as well, inasmuch as an opposite doctrine would not only subject employers to unreasonable, and often ruinous, responsibilities, thereby embarrassing all branches of business, but it would be an encouragement to the servant to omit that diligence and caution which by the contract of service he is bound to exercise, and which affords a better security against injury to himself than any recourse to the master for damages could afford.

"In *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212, 1 Am. & Eng. R. R. Cas. 101, a leading case in this country, Judge Cooley, in delivering the opinion of the court, said: 'No railroad company, and no manufacturing or business establishment of any kind, is bound at its peril to make use only of the best implements, the best machinery, and the safest methods. The state does not require it, and could not require it, without keeping such minute and constant supervision of private affairs, and interfering with such frequency, as, under all circumstances, would be irritating and damaging, and in many cases would become intolerable. In the main the state must leave every man to manage his own business in his own way. If his way is not the best, but nevertheless others, with a full knowledge of what his way is, see fit to co-operate with him in it, the state cannot interfere to prevent nor punish him in damages when the risks his servants voluntarily assume are followed by injuries.' The complaint in that case was that the injuries suffered by the plaintiff, who was a brakeman in the defendant's employ, was caused by the defective construction of the car in question, which, moreover, was what is called 'a foreign car,' and of all of which the plaintiff had no notice. But the court said that the dangerous character of the car was obvious, and therefore that its visible presence was the best notice to warn him of the danger. To the same effect are the decisions of this court. Thus in *Clark v. Richmond & D. R. Co.*, 78 Va. 709, 18 Am. & Eng. R. Cas. 78, it was held that the action could not be maintained because, apart from the legal effect of the contributory negligence of the plaintiff's intestate, who was a brakeman in the defendant's employ, the risk of his head coming in collision with the 'overhead bridge,' which caused his death, was one of the perils 'incident to the employment, in contemplation at the time of the contract [of service], and arising from causes open and obvious, the dangerous character of which the deceased had an opportunity to ascertain, and the risk of which he assumed.' See also *Sheeler v. Chesapeake & O. R. Co.*, 81 Va. 188, 201; *Darracutts v. Chesapeake & O. R. Co.*, 31 Am. & Eng. R. Cas. 157; *Piedmont Electric Illuminating Co. v. Patteson's Adm'x*, 6 S. E. Rep. 4. And decisions to the same effect from other courts of the highest character are almost without number, as a reference to any recent work on the subject will show.

"It is very clear, therefore, to my mind, that the charge of negligence against the company, so far at least as it is based upon the ground that the tender and car in question were not provided with 'sockets,' as they are called, cannot be sustained. These sockets, when used, are fastened to the corners of the cars and tenders. They are made of iron, and saucer-shaped, into which the ends of the push-pole are placed to prevent the

pole from slipping. The push-pole is a wooden implement about 11 feet in length, and is used in pushing cars from the side track by one end being adjusted against the tender of the engine on the main track, or on a parallel track, and the other end being placed against the car on the side track to be moved. When the accident occurred, the deceased, in obedience to orders, had adjusted one end of the pole against the tender; the other end being placed against the car on the side track by a fellow-servant. As the engine backed to push the car out, the end of the pole on the tender slipped, which threw the deceased under the wheels of the tender, and killed him. The plaintiff contends that the death of the deceased was caused by the negligence of the company, and that it was negligence on the part of the latter not to have provided the tender and car with sockets. The latter proposition, however, is disproved by the evidence for the plaintiff himself. It appears that the deceased was an experienced brakeman, having been employed on the road in that capacity for a number of years, and the undisputed fact is that these sockets are a new invention,—at least, ‘they are new in the south.’ Only a few of them have been put on the cars of the defendant company, and they are not much in use on other roads. The presumption is that the deceased knew that they were not used by the company, if, indeed, he had ever heard of such an appliance at all, when he entered its service, and that the parties contracted accordingly. At all events, the absence of the socket attachment to the tender when the accident occurred was a fact obvious to the deceased; and, as Judge Cooley said in *Michigan Cent. R. Co. v. Smithson*, a man ‘needs no printed placard to announce a precipice when he stands before it.’ ”

BRICE

v.

LOUISVILLE AND NASHVILLE R. CO.

(*Kentucky Court of Appeals, September 28, 1888.*)

Injuries to Brakeman—Coupling—Car Improperly Loaded—Assumption of Risk.—Where a brakeman attempts to couple a car which is so loaded that the lumber which it contains projects over the end of it so as to endanger the process of coupling, and the conductor knew, or might have known, that the car was thus improperly loaded, but it is not shown that he ordered brakeman to attempt to make the coupling, the brakeman must be deemed to have observed the danger for himself, and the company is not liable for damages for fatal injuries received whilst attempting to couple the cars.

Same—Order of Conductor—Pleading—Admissions.—In plaintiff's first amended petition she alleged that the deceased made the coupling by order of his superiors. This allegation was not denied in the answer to such petition. In plaintiff's second amended petition, she specifically al-

leged that the deceased was ordered to make the coupling by the conductor, and this allegation was positively denied. *Held*, that the denial to the second amended petition cured the omission in the answer to the first amended petition, and put the burden of proving that deceased acted under the order of the conductor upon the plaintiff.

APPEAL from Circuit Court, Christian County.

Action by Josie R. Brice against the Louisville & Nashville R. Co. to recover damages for injuries causing the death of the plaintiff's husband, J. J. Brice, a brakeman in the employment of the defendant. On the first trial of the case plaintiff recovered a judgment for \$5000, which was reversed on appeal. See 28 Am. & Eng. R. Cas. 542. At the conclusion of the plaintiff's testimony on the second trial, the circuit court upon the motion of the defendant instructed the jury to return a verdict in its favor. The plaintiff appeals from a judgment thereon.

E. P. Campbell, R. W. Henry, J. W. McPherson, and H. Ferguson for appellant.

The Felands and Wm. Lindsay for appellee.

BENNETT, J.—J. J. Brice, husband of the appellant, was brakeman on the appellee's freight train of cars, and while he was acting as such brakeman he received an injury by the wheels of one of the cars passing over his leg, which injury caused his death. The appellant, as the widow of said Brice, instituted suit in the Christian circuit court against the appellee to recover damages for said injury, on the ground that said injury was caused by the gross and wilful neglect of the appellee's employees having said train of cars in charge. The specific ground of recovery, as alleged by the appellant, is that one of the cars was loaded with lumber, and that the lumber extended so far over the end of the car as to make it perilous to Brice's life when he went between said car and another for the purpose of coupling them together, and that, in going between said cars for the purpose of coupling them together, by order of the conductor of the train, he was compelled to stoop in order to avoid being struck by the ends of said lumber, and in stooping he stumbled and fell; that at the time the conductor gave said order, he knew, or by the use of ordinary care could have known, that the car was so improperly loaded as to imperil the life of Brice. Upon the conclusion of the appellant's testimony the circuit court, at the instance of the appellee, gave the jury a peremptory instruction to find for the appellee. The question to be determined is, was said instruction rightfully given?

Facts.

If the appellant offered any evidence tending to prove her case as a whole, and not merely a part of it, then the court

should have allowed the case to go to the jury. The evidence introduced by the appellant established two facts: **Liability of company—Orders of conductor.** First. That the car was so improperly loaded with lumber as to imperil the life of the brakeman, if he went between it and the other car for the purpose of coupling them together. Second. That Brice did go between said cars for the purpose of coupling them together, and that he was compelled to stoop in order to avoid the projecting lumber, and in doing so he stumbled and fell. Third. It might have been inferred by the jury from said facts that the conductor knew, or could have known by the use of ordinary care, that the car was so improperly loaded as to imperil the life of Brice going between for the purpose of making a coupling. The foregoing facts were essential to the appellant's right to recover; also, under the circumstances of this case, it was essential for the appellant to prove that said Brice went between said cars for the purpose of coupling them together, by the order of the conductor; but there was a total failure of proof in reference to that matter, and no fact was proven from which the jury would have been authorized to infer that such order was given. According to the appellant's allegations and the proof in the case it was a patent fact that the car was so improperly loaded as to imperil the life of Brice, if he went between the cars for the purpose of making the coupling, and he was right at the place of danger, and could see for himself that it was perilous to his life to go between said cars for the purpose of making the coupling, and it was his right without violating his duty to his employer to refuse to go between said cars. But if the conductor knew, or could have known by the use of ordinary care, that the car was so improperly loaded as to imperil Brice's life, and, notwithstanding, ordered him to go between the cars, and couple them together, then Brice had the right to rely upon the conductor for protection, and that the appellee would be responsible for any damage that might befall him by reason of his obeying said order. But in such a case it devolved upon the appellant to show that Brice acted in obedience to the order of the conductor. The appellant contends that the proof that such order was given was dispensed with by reason of the fact that it was alleged in her first amended petition, and not denied in the answer thereto, that Brice did make said coupling by order of his superiors. It is true that said allegation in said petition was not denied in the answer thereto; but, in the appellant's second amended petition, she specifically alleges that Brice was ordered to make said coupling by the conductor. This allegation is positively denied, which we deem sufficient to cure the omission in the answer to the first amended petition, and to put the burden of proof upon the appellant. As before intimated,

under the circumstances of this case, the failure of the appellant to swear that Brice made said coupling by the order of the conductor was fatal to her right to recover, and the court did right in instructing the jury to find for the appellee. The judgment is affirmed.

LOUISVILLE, NEW ALBANY AND CHICAGO R. CO.

v.

WRIGHT.

(115 Ind. 378.)

Injuries to Servants—Brakeman—Overhead Bridge—Assumption of Risks

—A brakeman who, on a dark night, is knocked off the top of a car while in the discharge of his duty, by a low overhead bridge of which he had neither knowledge nor notice of its dangerous character, is entitled to recover against the company for injuries received such injury not being one of the risks assumed by him when he entered into its employment.

APPEAL from Circuit Court, Jasper County.

On petition for rehearing. The opinion of the court on the original hearing, which embodies the facts involved in the case, is reported in 33 Am. & Eng. R. Cas. 370.

George W. Easley and *W. F. Stillwell* for appellant.

W. P. Adinson, J. P. Wright, and E. P. Hammond for appellee.

ZOLLARS, J.—It was held in the principal opinion that we could not, over appellee's objection, decide the questions made upon the giving and refusal of instructions, for the reason, as there stated, that, although the clerk had copied into the record what purported to be instructions given and refused, there was nothing to show that they had been filed by him as required by the statute, in order that they might become a part of the record without a bill of exceptions. In its petition for a rehearing, appellant's counsel cite us to another portion of the record where the instructions thus given and refused are embodied in the bill of exceptions. This they should have done in their original briefs, as required by rule 19 of this court. The question was made in appellee's brief, and in his counsel's statement of points for oral argument, that the instructions were not in the record for the reasons above stated, and stated in the principal opinion. Appellant's counsel now claim that they met the question thus made in their oral arguments. If their recol-

lections are correct, ours are at fault. However that may be, as the case is an important one, we give to appellant the benefit of the doubt, and have very carefully examined all of the instructions given and refused, as also the arguments of counsel in relation thereto. The theory of appellant's counsel is that the railway company was only bound to exercise ordinary care in the construction and maintenance of the bridge, and that the jury should have been so instructed; and, further, that if appellee had an opportunity, by the exercise of care, to discover that the bridge was too low to pass under with safety, and remained in the service of the company, he must be held to have voluntarily assumed the risk, and thereby waived all right of action for damages.

Complaint is made that some of the instructions given at the request of appellee, and upon the court's own motion, do not come up to the standard thus fixed by appellant's counsel, in that they omit the element of ordinary care on the part of appellant in the construction and maintenance of the bridge, and put the case to the jury regardless of the assumption of risk on the part of appellee.

Whole instructions must be considered together.

It would be a tedious, and we think unprofitable, task to set out all of the numerous instructions thus objected to, and to extend this opinion in meeting specifically the objections urged. Some of the instructions are somewhat confused, in that the jury were instructed in relation to matters not in issue either by the pleadings or the proof; but we think that the extraneous matters referred to could in no way have misled the jury to the prejudice of appellant. Some of the instructions given were, perhaps, not as full as they might have been; but it has often been held by this court that it is unnecessary, as it is impracticable, to embody all of the law of the case in one instruction, and that where a rule of law applicable to the case is given in one instruction it is not necessary to repeat it in another; and, further, that if an instruction contains no erroneous proposition of law as applied to the case, and either party thinks that it is faulty because not full enough, his remedy is to submit additional instructions. *Louisville, N. A. & C. R. Co. v. Jones*, 108 Ind. 551 (570), 28 Am. & Eng. R. Cas. 170, and cases there cited; *Board of Commissioners v. Legg*, 110 Ind. 479 (485), and cases there cited; *Wilson v. Trafalgar, etc., Gravel Road Co.*, 93 Ind. 287 (291). And so it has many times held that all of the instructions given must be considered together; and that if, thus considered, the law was correctly stated, in such a manner as to be intelligible and not confusing to the jury, the judgment will not be reversed by reason of inaccurate statements in any particular instructions. *Louisville, N. A. & C. R. Co. v. Jones, supra*, and cases there cited; *Cline v. Lindsey*, 110 Ind. 337,

and cases there cited ; *Rauck v. State*, 110 Ind. 385, and cases there cited ; *Deig v. Morehead*, 110 Ind. 451, and cases there cited.

Leaving out of consideration for the present the seventh instruction given at the request of appellee, the others, given at his request, and upon the court's own motion, taken together, put the case to the jury substantially upon the theory contended for by appellant's counsel ; and in the ten instructions given at the request of appellant's counsel, their theory was pushed to the utmost limit, and in some instances beyond what reason and the correct rules of the law will justify. It appears in this case that the brakes which appellee was required to set were on the tops of the cars. It was necessary for him, in getting to them, to pass over the tops of the cars. There are cases which hold that in such a case railway companies are not bound to erect the overhead bridges constructed by them of such a height that brake men can stand or walk erect upon the tops of the cars without coming in collision with them. As applied to this case especially, we cannot approve of those rulings. Here the bridge was but four feet and nine inches above the top of the cars. The brakes were on the tops of the cars ; and, to get to them, the brakemen were required to pass over the tops of the cars, not only in the day-time, but also in the night-time, and often, doubtless, as in this case, when the night was dark, raining, and foggy, and when it would be almost, if not quite, impossible for them to know of the proximity of such bridges when called to brakes upon moving trains, even if they had knowledge that such bridges were maintained. To erect and maintain such bridges under such circumstances is negligence. Further reflection has strengthened the conviction on our part that this conclusion is fully sustained, both by reason and the better authority. In addition to the authorities cited in the principal opinion, we cite the following :

Brakeman does not assume hazard from low overhead bridge.

1 *Shear. & R. Neg.* (4th Ed.) § 198 *et seq.*, and notes, and cases there cited. *Beach, Contrib. Neg.* § 134 ; *Chicago & A. R. Co. v. Johnson*, 116 Ill. 206. And where, as here, the facts are shown without any conflict in the evidence, the court may charge the jury that, in the erection and maintenance of the bridge, the railway company was guilty of negligence. *Board of Commissioners v. Legg*, 110 Ind. 479, and cases there cited.

In the contract of hiring, an employee assumes all risks ordinarily and naturally incident to the service, but he does not assume the risk of injury from unusual hazards. To say the least, in this case, appellee did not, by his contract of hiring, assume the risk of injury from the low bridge, unless he had knowledge of the hazard. The danger from such a bridge is not a hazard ordinarily and naturally connected with the service. It is not

shown that he was informed of the danger, nor that he had knowledge of it when he engaged in the service. As to his duty to exercise care for his own safety, both in discovering the danger and in avoiding the injury, the jury were fully instructed, and, as we have said, and without being more specific, the rule was pushed beyond what reason and the law will sanction.

It is not easy to determine whether the seventh instruction given at the request of appellee was intended to place appellee's right to recover upon the doctrine of comparative negligence, or upon the ground of wilfulness on the part of appellant, in which case negligence on the part of the appellee would not defeat his right to recover. Upon either construction the instruction was erroneous.

In the first place, the doctrine of comparative negligence, as held by the Illinois court, and as applied to a case like this, has no place in the rulings of this court; and, in the second place, appellant is not charged with wilfulness in the complaint. The error, however, must be regarded as a harmless one, as the jury found, in answer to interrogatories, that appellee was not guilty of negligence. It is therefore apparent that the verdict was not based upon the greater negligence of appellant and the lesser negligence of appellee; nor upon the theory that, although appellee was guilty of negligence, he could yet recover by reason of wilfulness on the part of appellant. See *Worley v. Moore*, 97 Ind. 15; *Woolery v. Louisville, N. A. & C. R. Co.*, 107 Ind. 381, 27 Am. & Eng. R. Cas. 210.

As to the eleventh instruction asked by appellant and refused by the court, it is sufficient to say that it does not state the law correctly; and that, if it did, the error in refusing it would be a harmless error, as the second instruction so asked and given embodied the substance of it. *Stephenson v. State*, 110 Ind. 358; *National Benefit Assoc. v. Grauman*, 107 Ind. 288. And so of instructions 12 and 12½ asked by appellant and refused by the court, without deciding whether, as asked, they stated the law correctly, it is sufficient to say that the substance of them was embodied in other instructions given. From what is here said it must not be understood that we intend to indorse in full the theory upon which appellant's counsel have argued the alleged errors in the giving of instructions as above stated, and as applied to a case like this.

After a careful consideration of all the questions discussed by counsel, we are satisfied that the record presents no error for which judgment should be reversed. The petition for a rehearing is therefore overruled.

Master and Servant—Minor—Assumption of Risks—Brakeman.—If a railroad company contracted with a minor to work as a brakeman on its road, and the minor, at the time of the contract, was of such tender years as not

to know the hazards and risks of the service, and the fact of his being a minor was known to the company and the contract was made without the consent of his guardian, the taking of such minor into the service of the company is an act of negligence on its part, and in the event of his death through dangers incidental to the service his representatives are entitled to recover. But if the minor entered into the service of the company with knowledge of the fact that there were overhead bridges upon the company's road which were dangerous, and if he knew of the condition of the bridge which caused his death and possessed sufficient intelligence to know the danger of such bridge and to know how to avoid that danger, no recovery can be had. *Goff's Adm'r v. Norfolk & W. R. Co.*, 36 Fed. Rep. 299.

Injury to Trainmen from Colliding with Bridge Trusses and Timbers.—See note, 33 Am. & Eng. R. Cas. 382, 384.

CARBINE'S ADM'R

v.

BENNINGTON AND RUTLAND R. CO.

(*Vermont Supreme Court, April 11, 1889.*)

Master and Servant—Overhead Bridge—Assumption of Risk.—In an action for damages for negligently causing the death of plaintiff's intestate, it appeared that the deceased, a brakeman of many years' experience, had been, at the time of his death, seven months in the employ of the defendant. Whilst riding upon a coal-car, which was higher than common cars, he was hit by the arch of a bridge and was killed. The evidence showed that the deceased had frequently ridden on coal-cars, that he passed through the bridge daily, and that he must have known of its height and condition. *Held*, that the deceased had assumed the risk of his employment in respect to the bridge and that no recovery could be had.

ON exceptions from Rutland County Court.

Action by the administrator of James Carbine against the Bennington and Rutland R. Co. for damages for negligently causing the death of plaintiff's intestate, who was knocked from the top of a car while passing through a bridge near Wallingford, on the defendant's road. The negligence alleged on the part of the defendant was its failure to maintain a bridge of sufficient height, and to provide any warning to the deceased of the approach of the train. The plaintiff requested an instruction to the jury that "it was the duty of the railroad company to provide some reasonable means of warning or notifying its brakemen of the approach of dangerous bridges." The charge of the court upon this point was as follows: "If the bridge was unsafe and they were negligent in

Case stated.

not raising it, was it the duty of the defendant to notify the plaintiff of the danger he would encounter on the last trip he made? If it was his first trip, I should not have any doubt on the subject. If the defendant knew that it was dangerous for a brakeman to be on the top of those cars on the first trip that he made, or any subsequent trip until he became acquainted with the bridge, I should say it was the duty of the defendant in some manner to notify him of the danger he was to encounter, so he might have prevented it; but if the plaintiff knew of the danger, if he knew of the condition of the bridge and its height, and the danger he would encounter in passing through it, then I should say there was no necessity of notice." The jury returned a verdict for the defendant and the plaintiff excepted.

Butler & Moloney for plaintiff.

J. K. Batchelder and *George E. Lawrence* for defendant.

TAFT, J.—The disposition of one question controls this case and renders the other questions discussed immaterial. A servant assumes all ordinary risks incident to his employment. By entering upon and continuing in his service, he is presumed to take upon himself its natural and ordinary risks and perils. Railroad managers are bound by law to provide their servants with safe and suitable roadbeds and machinery, including all appliances for the discharge of their respective duties; there is an implied contract on their part to perform this duty. No authorities contravene the rules above stated. But a servant assumes no risk caused by his employer's breach of duty, unless he has knowledge of the danger thereby caused, and voluntarily continues in the employment. If with this knowledge he does continue, the increased danger becomes an incident of the service which he assumes, and for any injury resulting therefrom the master is not liable. By the acceptance of the service, and the continuance therein, the servant assumes the hazard incident to obvious and known dangers. *Gibson v. Erie R. Co.*, 63 N. Y. 449; *De Forest v. Jewett*, 88 N. Y. 264, 8 Am. & Eng. R. Cas. 493; *Buzzell v. Laconia, etc., M'f'g Co.*, 48 Me. 113; *Baylor v. Delaware, etc., R. Co.*, 40 N. J. Law, 23; *Baltimore and O. R. Co. v. Stricker*, 51 Md. 47; *Devitt v. Pacific R.*, 50 Mo. 302; *Smith v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 32; *Cagney v. Hannibal and St. J. R. Co.*, Id. 416. The plaintiff's intestate had been, at the time of his death, seven months in the employ of the defendant as a brakeman. He was an experienced one, having acted as such for many years. The testimony tended to show that while he was on the top of a coal-car, he was hit by a board in the arch of a bridge near Wallingford, and killed; that a person could not stand on the top of a car and ride

Assumption of risk—Knowledge of condition of bridge.

through the bridge, the latter being too low ; that the train upon which Carbine was employed usually contained coal-cars, which were higher than common ones ; that he was frequently on them, knew of their height, and had ridden on them ; passed through the bridge daily, and must have known of its height and condition. The case standing in this position, the jury were told that, if Carbine knew of the defective and dangerous condition of the bridge, he could not recover ; that if he engaged as brakeman with knowledge of what his duties were, and continued as brakeman when he knew of the dangers attendant upon his remaining there, then he assumed the risks that he might incur by remaining in the defendant's employ ; but, if he elected to continue in his employment after he knew of the dangerous character of the bridge, he continued at his own risk. These instructions correctly state the law as applicable to the case at bar. The plaintiff insists that "the continuance of the servant in his employment, with knowledge of the defect, is not necessarily a bar to his recovery." As an abstract proposition this may be correct. There may be exceptions to the general rule, —cases where a servant would have a right of recovery although he continues in service with knowledge of defects in the instrumentalities of his vocation. He may know of a defect, but not of the hazard likely to arise from it. He may have known of it, but had reason to believe it had been remedied. It has been held in some jurisdictions that if, upon notice, the master assures the servant that he will remove the defect, and the servant continues in the employment on such assurance, he is presumed not to have waived the defect, and may maintain an action against the master for any injury caused by it. But, whatever these causes are, they constitute exceptions to the general rule above stated. We do not say that an employee who takes a risk that imperils his safety cannot in any case maintain an action, but we do hold that, if he knowingly and deliberately assumes a risk that leads him into immediate danger, he cannot recover for injuries that arise from perils that are obvious and certain. The case at bar was not within any exception to the general rule. There is nothing in the record to show that there was any testimony tending to support a case within any exception, but the case calls for the application of the naked rule that, if the intestate continued in service with a knowledge of the dangerous character of the bridge, he did so at his peril. Having assumed the perils of his employment in respect to the bridge, the question of contributory negligence was not in the case, for if he was not guilty of it he had no right of recovery. The case stands exactly the same in regard to a lack or want of means warning or notifying a brakeman of the approach to the bridge. The want of such means of warning, or rather, the

perils arising therefrom, were risks he assumed by continuing in his employment. There was no error in the illustrations used by the court. The bridge was built in 1862, and there was no question in the case affected by the statute of 1872, or R. L. §§ 3418, 3419; and it is difficult to see how there could have been if the structure had been erected since 1872, for Carbine having assumed the perils of his employment in respect to the bridge, the negligence of the defendant in that aspect of the case became immaterial. Judgment affirmed. All concur.

SCANLON

v.

BOSTON AND ALBANY R. CO.

(*Massachusetts Supreme Judicial Court, October 19, 1888.*)

Master and Servant—Brakeman—Assumption of Risks—Signal-post.—If the distance between a single post and the ladder on a freight car is only one foot, and permanent erections so near the track are few and exceptional, a brakeman who, on his first trip, was ignorant of the proximity of any such erections and was not warned thereof, did not assume the risk of accidents arising therefrom, the danger not being so obviously incident to his employment that he must be presumed to know it.

ON report from Superior Court, Worcester County.

Tort by Patrick J. Scanlon against the Boston & Albany R. Co. to recover damages for personal injuries sustained whilst a brakeman in the employ of the defendant. Whilst plaintiff was riding upon a car, a signal-post on defendant's line which was so erected that cars passed within one foot of it, struck him and knocked him off the car. At the trial, a verdict was directed for the defendant, and the case was thereupon reported for the opinion of the supreme judicial court.

W. S. B. Hopkins for plaintiff.

Frank P. Goulding for defendant.

W. ALLEN, J.—The danger—the risk of injury which it is claimed that the plaintiff assumed—was not the par-

ticular danger from the post which caused the injury, but the general danger from structures and erections near the track. The plaintiff had no actual knowledge of the danger, and he cannot be held to have assumed the risk of it unless the character of the danger and the circumstances are such as to show that he ought to have known and appreciated it. The fact that it was incident to the employment is not sufficient. Danger from dangerous machinery or appliances or structures is incident to employment upon them, but the risk is not assumed by the employee unless he knows the danger, or unless it is so obviously incident that he will be presumed to know it. The danger in this case was not from objects casually or accidentally near the side of the car, but from permanent erections maintained near the track by the defendant. The circumstances are not such that the plaintiff will be presumed to or ought to have known of the danger. He did not know that there were erections so near the track as to endanger him. Such erections were in fact few and exceptional. Within 15 miles of Boston there were three signal-posts, one telegraph pole, and three bridges and abutments. It does not appear whether there were any others upon the road. It was the plaintiff's first trip as brakeman. He was unfamiliar with the road and with the running of trains, and was not informed that there was any such danger, or in any way cautioned in regard to it; and he had no reason to know that there were permanent erections so near the tracks as to make it dangerous for him to be upon the place on the car which was provided by the defendant. *Lovejoy v. Boston & L. R. Co.*, 125 Mass. 79, was a case in some respects very similar to this. An engineer, leaning out from the cab of his engine, was struck by a signal-post. The post was one of a series equally distant from the track. The abutments of 46 bridges, and numerous buildings, station entrances, and other structures on the line of the railroad, were as near to the track. And these facts were known to the plaintiff. The court say: "If there was any danger to the plaintiff while in the performance of his duties from the structures thus placed it was a risk he had assumed. He knew the manner in which the road was constructed, and the proximity to the track of these structures, and the methods employed in the management of the trains. The defendant had the right to construct its road and conduct its business in this manner; and, as was said in *Ladd v. New Bedford R. Co.*, 119 Mass. 412, is not liable to one of its servants who is capable of contracting for himself, and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom." In *Yeaton v. Boston & L. R. Co.*, 135 Mass. 418, 15 Am. & Eng. R.

Risks assumed
—Erections
near track.

Cas. 253, the plaintiff was employed upon a switching engine which was used to move cars about the defendant's yard, and part of plaintiff's business was to move damaged cars, and he knew the danger that attended handling them, and sometimes examined cars to see if they were damaged. The court held that the defendant was not bound to give notice to the plaintiff that a particular car, which was in the yard to be moved, was defective, but that the plaintiff took the risk of ascertaining that fact. In the case at bar it was the general danger from permanent structures, of which the defendant failed to give notice. *Leary v. Boston & A. R. Co.*, 139 Mass. 580, was the case of a fireman upon a switching engine, who was standing upon the foot-board of the engine, and was thrown off by the jolting of the engine in crossing frogs and switches. It was held that upon the plaintiff had full knowledge of the danger, and assumed the risk, and that the defendant was not in fault. In *Ferren v. Old Colony R. Co.*, 143 Mass. 107, the plaintiff was injured by being pressed between a car which he was pushing and a building. He knew the position of the building and of the car, but did not appreciate the peril. The court say: "The material point of distinction between this case and many others is that here it is open to the jury to find that the plaintiff did not know or appreciate the risk of the work upon which he was engaged, and that, in the exercise of due care, he was not, as matter of law, bound to know or appreciate the same." In the case at bar we think that the danger was not so obviously incident to the employment that the plaintiff can be held to have assumed the risk of injury from it, and that it cannot be said, as matter of law, that he was bound to know and appreciate the danger. New trial granted.

Master and Servant—Negligence—Erections in Proximity to Track.—See *Ryan v. Canada S. R. Co.*, 26 Am. & Eng. R. Cas. 344, note, 350; *Baltimore & O. R. Co. v. Rowan*, 23 lb. 390, note, 397.

Same—Switchman—Assumption of Risks—Switch-stand.—Plaintiff, a switchman, was engaged in removing flat cars, and, in the course of his duties, passed to the rear and east side of a car and got down upon the step ready to get off. While in this position, the stand of a switch struck him and knocked him off. The distance from the switch-stand to the side of the car was nine or ten inches. The company's printed rules provided that no buildings, wood, freight, or material of any kind should be allowed within six feet of the main track. Plaintiff testified that he knew of this rule and expected to find the track clear; that he knew there was a switch-stand there, but did not know and had never been informed that it was so near. The evidence showed that most of the work in the yard was done on the west side of the cars, but that sometimes the men rode on the east side. It did not appear, however, that plaintiff had ridden or got off on that side before. The switch-stand had been in the same position for about fourteen years. Plaintiff had worked in the yard seven or eight days. Held, that the peril arising from the switch-stand was not one

assumed by the plaintiff, and that the evidence was sufficient to establish negligence on the part of the railroad company. *Pidcock v. Union Pac. R. Co. (Utah)*, 19 Pac. Rep. 191. The court said:

"It is said, however, that the peril was one assumed by the plaintiff on entering the service of defendant. It is true that the company was not liable for the ordinary risks incidents to plaintiff's employment, or to such dangers as he might have known and avoided in the use of reasonable diligence. But he did not assume such risks as without fault on his part he might be exposed to by the negligence of the defendant. In the case of *Hulsehan v. Green Bay, W. & St. P. R. Co.*, 12 Am. & Eng. R. Cas. 208, it appeared the plaintiff, a switchman, struck his toe against a piece of wood allowed to lie along the track, and was thrown down and injured by a car that he was attempting to couple. The court said: "The evidence shows that the plaintiff, when he received the injuries, had only been in the defendant's employ as a brakeman about two weeks; that he knew there was wood scattered along the tracks near the wood-pile on the road, but that he had not noticed that wood was scattered along the track at the place he was injured. . . . His evidence shows that he had a general knowledge of the neglect of the company in keeping its tracks clear about its wood-yards. There is, however, no evidence showing his knowledge of the condition of the track at the place where the injury occurred. This evidence is not conclusive upon the plaintiff that he assumed all risk which arose from such neglect of the company. Even had he known of the existence of the wood lying along the side of the track at the place where he was injured, it would not be conclusive against him. He might have a general knowledge of the defects of the road, but may not have had such knowledge of the dangerous character of such obstructions as to absolutely charge him with the assumption of all risk arising from such obstructions. Notwithstanding his knowledge of the fact of the obstruction, still it was a question for the jury whether he was guilty of negligence in remaining in the employ of the defendant after such knowledge. For this reason, and because there was no evidence that he had knowledge of the particular obstruction which caused the injury, we cannot say that the verdict of the jury upon this question is against the evidence." In the case of *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 16 Pac. Rep. 146, the court said: "It is true that he had run over the road, and through the bridge, daily, for three months preceding the accident. He knew of the existence of the bridge, and that it was constructed with overhead timbers; but it does not necessarily follow that he was acquainted with the proximity of the braces to the top of the caboose or cars. When he entered the service of the company, he assumed the ordinary risks incident to the service, and if he enters or continues in the service with a knowledge of the risk or danger, and without objection, he must abide the consequences. . . . The law, however, does not require that an employee shall know of all defects or obstructions that may exist on the road, or in the service in which he is engaged. And it cannot be said that the peril in this case was so obvious and patent that Irwin must have known it. He had a right to assume that the company had done its duty and placed its track in such a condition that he could perform his duties with reasonable safety." To the same effect are *Chicago & I. R. Co. v. Russell*, 91 Ill. 298; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183; and *White v. Nonantum Worsted Co.*, 144 Mass. 276. Inasmuch as our view of the law accords with the cases cited, we will not extend this opinion by adding a consideration of numerous other cases to which reference was made in the argument of counsel."

Same—Section-hand—Travelling on Train.—Plaintiff, a section-hand,

while on his way to dinner, on one of defendant's trains, was forced, owing to the great number of persons on the platform, to stand on the bottom step of the caboose. While in this position he was struck on the back of the head while the train was in motion, by the lever or signal of a switch that stood in the yard. The switch-stand was within four feet of the railroad track, and when in an upright position was that distance from the track; but when in a leaning or slanting position was so near as to come in contact with the side of the cars as they passed along the railway track. *Held*, that plaintiff had a right to expect that no such obstruction would exist in such proximity to the train as to cause injury, and that there was sufficient evidence to justify the court in submitting the case to the jury. *Boss v. Northern Pac. R. Co. (Dak.)*, 40 N. W. Rep. 590.

Same—Construction-hand.—A complaint in an action for damages for personal injuries alleged that plaintiff, a construction-hand, at the time of his injury was travelling upon a flat car in the course of his employment; that by direction of the company's agent he took his seat upon the edge of the car, "as was the universal custom;" that after taking his position thereon, plaintiff was knocked off the cars by a stake or beam of which he had no knowledge or means of knowledge, and which through gross negligence was placed and left standing so near the railroad track, and in such a manner as to strike the plaintiff while riding on the car. *Held*, that plaintiff did not assume the risk of accident from such erections as the stake or beam in question, and that the averment that he took the position he was ordered to take, "as was the universal custom," did not imply an admission that he thereby assumed the risk of dangers which he alleged were unknown to him. *Arabello v. San Antonio & A. P. R. Co. (Tex.)*, 11 S. W. Rep. 913.

NUGENT

v.

BOSTON, CONCORD, AND MONTREAL R. CO.

(80 Me. 62.)

Personal Injuries—Negligence—Conflicting Testimony—Province of Jury.—Although, in actions for personal injuries, the question of contributory negligence depends upon undisputed facts, it is properly submitted to the jury if different inferences may be drawn from the facts, or if they are of such nature that fair-minded men may arrive at different conclusions.

Same—Contributory Negligence—Evidence.—When the evidence shows that plaintiff, a brakeman, ascended a freight car in answer to a signal for brakes, but before reaching the top of the car was caught by the awning of a station which projected within 18 inches of the top of the car, and was thrown to the ground, there is no evidence of contributory negligence justifying the court in withdrawing the case from the jury, even though the engine might have controlled the train under steam, if, at the time of the accident, plaintiff's opportunities of acquiring knowledge of the awning were so few that he might reasonably be presumed to be ignorant of its proximity.

Master and Servant—Traffic Agreement—Liability of Lessor.—A railroad company, over a section of whose track another company, by virtue of a contract, runs its trains, is liable in tort to the latter's brakeman, who, without fault of himself, or of his co-employees, receives a personal injury while in the performance of his duty on his employer's train, solely by reason of the negligent construction of the former's depot.

Lease—Statutory Authority—Liability of Lessor.—A railroad company which leases its road pursuant to a statutory authority which does not contain any provision releasing it from the performance of its duties to the public, is liable for personal injuries sustained by the brakeman of a third company rightfully upon the road, caused by a defect in the construction of the awning of a station.

Master and Servant—Negligence—Defective Premises—Evidence.—In an action by a brakeman for damages for injuries sustained through the proximity of the awning of a station to the ladder of a freight car which he was ascending, testimony that the awning of no other station-house on the line was similar to the one which caused the injury, is admissible.

ON exceptions and motion to set aside a verdict, from Supreme Judicial Court, Cumberland County.

Action on the case by Joseph C. Nugent, a brakeman in the employ of the Portland & Ogdensburg R. Co., to recover damages for personal injuries sustained while travelling over the defendant company's line, in the course of his employment. The jury returned a verdict for plaintiff for \$3,100, whereupon the defendant filed exceptions and moved to set aside the verdict.

Wilbur F. Lunt and Joseph W. Spaulding for plaintiff.

Almon A. Strout for defendant.

VIRGIN, J.—By a contract of March 1, 1884, the Portland & Ogdensburg R. Co., for certain valuable considerations therein expressed, was permitted, among other things, to run all of its through freight trains, for one year at least, over that portion of the defendant's tracks between certain named stations,

Facts.

between which was the Bethlehem station; the defendant "assuming all liability and risk of accident arising from defect of road-bed or track, or default of its employees or servants." On June 10, 1884, while the permit was in full force, the Boston & Lowell R. Co. leased for 99 years the defendant's railroad, stations, etc.; agreeing to save harmless the defendant "against all claims for injuries to persons during the term, from any and all causes whatever." The plaintiff was rear brakeman on a Portland & Ogdensburg special freight train, bound west. While he, in pursuance of a signal for setting brakes, was rapidly ascending the iron ladder on the side of a box car to perform his duty of setting the brake thereon, the train being in motion, his head came in contact with the end of the depot awning, of same height as the car, and 18 inches therefrom, and he was thereby knocked off between the cars, and, before he could extricate himself, his right arm was so crushed by the wheels of the saloon car that amputation became necessary. The jury, after a

charge to which, so far as the general merits of the case is concerned, no exception is alleged, returned a verdict for the plaintiff for \$3,100. Under the instructions, the jury must have found (1) that the awning was negligently constructed on account of its proximity to the passing car; (2) that the injury was caused solely thereby; and (3) that the plaintiff was in the exercise of ordinary care at the time of the injury.

It is contended that the plaintiff was guilty of contributory negligence, and that, as the facts in relation thereto were undisputed, the question was one of law, and should therefore have been decided by the presiding justice, which he declined to do, but submitted it to the jury. While there are numerous cases wherein questions of the negligence of both parties, in actions of this nature, have been decided by the court on undisputed

facts, still the negligence of neither party can be conclusively established by a state of facts from which different inferences may be fairly drawn, or upon which fair-minded men may reasonably arrive at different conclusions. *Brown v. European & N. A. R. Co.*, 58 Me. 384; *Lesan v. Maine Cent. R. Co.*, 77 Me. 85, 91; 23 Am. & Eng. R. Cas. 245; *Shannon v. Boston & A. R. Co.*, 78 Me. 52, 60; 23 Am. & Eng. R. Cas. 571; *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Treat v. Boston & L. R. Co.*, 131 Mass. 371; 3 Am. & Eng. R. Cas. 423; *Peverly v. Boston*, 136 Mass. 366; *Lawless v. Connecticut River R.*, Id. 1; 18 Am. & Eng. R. Cas. 96; *Sioux City & P. R. Co., v. Stout*, 17 Wall. 657, 663, 664. As a practical illustration of this proposition: The conductor of a freight train had resided at the place of accident for 20 years, and, as conductor and brakeman, passed the station once or twice daily for 7 years. Just as his train started up, he caught hold of the side ladder of a passing car, and, without any call of duty there, as he climbed towards the top, was struck and killed by the roof of the depot which projected over, and within 34 inches of the car, and the court was divided on the questions of negligence involved. *Gibson v. Erie R. Co.*, 63 N. Y. 449. So in another case where a brakeman (the plaintiff) who had pulled out the pin and disconnected a portion of the train from the engine, was walking beside the train, and, on signal for brakes, ran up the side ladder of a car, and was struck, knocked off, and lost his arm, by the awning which projected within 18 inches of the car, the court held the plaintiff not guilty of contributory negligence, but set aside the verdict of \$10,000 as excessive. The court remarked: "It would be preposterous in us to say, or to ask a jury to say, that a brakeman, engaging in the service of a company, must be held to know whether or not there may be one among the station houses whose roof or awning so projected over the line of the

Question of
contributory
negligence
properly sub-
mitted to jury.

road, that a brakeman on a freight train, in the performance of his duties, would be liable to be swept from the train by collision with it." *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183. We are of opinion that the presiding justice very properly submitted to the jury the question of the defendant's negligence, and also that of the plaintiff's exercise of ordinary care.

Moreover, a careful examination of all the testimony bearing upon these questions, aided by the exhaustive argument of counsel, has failed to satisfy us that we ought to interpose and set the verdict aside. And, without taking space to state our reasons at length, we remark: The train never stopped at this station, except when obstructed by another, and occasionally down by the tank for water. His attention was never particularly called to the nearness of the awning, as he had no occasion to notice it in passing. When the accident happened the plaintiff was engaged in the prompt performance of a call to active duty. The exigency caused by the repeated starting and stopping of the mixed train required his speedy ascent to the top of the car by means of the ladder. Before he reached it his car, being in motion, arrived at the awning. Due care on the part of the defendant required space enough between the car and the awning for reasonable action of body, arms, and legs of the brakeman, whose duty required him to ascend the ladder there. It was deficient in this respect, and the plaintiff, with his attention properly fixed on his duty, was struck. It is no answer that the train, though on a down grade of 30 feet to the mile, might be handled by the engine when working steam. The plaintiff's duty was not to rely on the possibility of the engine's holding the train, but to perform the duty signalled by the conductor standing on the engine; and he lost his right arm in the prompt attempt to perform it, in consequence of the defendant's faulty awning. The acts of the plaintiff "cannot be judged of by the rule applicable to the persons engaged in no special or particular duty." The plaintiff's previous knowledge of the awning must, on account of his few opportunities for gaining it, have been comparatively slight, and was by no means decisive. "The service then and there to be performed was of a character to require his exclusive attention to be fixed upon it, and that he should act with rapidity and promptness; and it could hardly be expected that he should always bear in mind the existence of the defect, even if he knew it, or be prepared at all times to avoid it." *Snow v. Housatonic R. Co.*, 8 Allen, 441, 450.

But while this rule may not be seriously questioned as between a railroad company and its own employees, the defendant challenges its application as between it and the plaintiff. This presents the question whether a railroad company, over a section of whose track another company—by virtue of a contract—

runs its trains, is liable in tort to the latter's brakeman, who, without the fault of himself or of his co-employees, receives a personal injury while in the performance of his duty on his employer's train, solely by the reason of the negligent construction of the former's depot. We are of opinion that it is. In such case, the only materiality which attaches to the contract between the companies is to make certain that the plaintiff was lawfully, and not a trespasser, on the defendant's road. And although the defendant, in its contract with the Portland & Ogdensburg Co., in express terms "assumed all liability and risk of accident from a defect of road-bed, track, or default of its employees," nothing was thereby added to the defendant's legal obligation and duty; these terms did not express all which the law required of railroad companies as to the reasonable safety of its station-houses. *Tobin v. Portland, S. & P. R. Co.*, 59 Me. 183. It is common learning that as a compensation for the grant of its corporate franchise, intended in large measure to be exercised for the public good, the common law imposed upon the defendant a duty to the public, independent of contract and co-extensive with its lawful use, to keep its road and its appurtenances in a reasonable, safe, and proper condition. *Thomas v. West Jersey R.*, 101 U. S. 71, 83; *Bean v. Atlantic & St. L. R. Co.*, 63 Me. 293, 295.

If the cause of action were a breach of the contract, the) untiff could not maintain an action thereon for want of privity.

Privity of con-
tract not es-
sential.

But this is an action, *ex delicto*, for an injury caused by a neglect of a duty created by law; *Broom, Com. Law* (4th Ed.), 675, 676, and cases; and, for the neglect of such a duty, privity is not essential to the maintenance of an action of tort therefor. *Campbell v. Portland Sugar Co.*, 62 Me. 552, 564; *Broom, Com. Law*, 673 *et seq.* This principle is variously illustrated by the numerous cases cited in *Broom, Comm.* 655, 670, thus: A railroad company is liable for the loss of a passenger's luggage, whose fare was paid by another, not on account of breach of contract, but of legal duty. *Marshall v. York, N. & B. R. Co.*, 11 C. B. (73 E. C. L.) 655. So, where the defendant sold naphtha to one known to him as a retailer of fluids, to be burned in lamps for illuminating purposes, and a retailer sold a pint thereof to the plaintiff to be used in a lamp, and it exploded, the defendant was held liable, "not upon any supposed privity between the parties, but upon a violation of duty in the defendant, resulting in an injury to the plaintiff." *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64, 67. So, where a chemist compounded a hair wash, and knowingly sold it to a husband for the use of his wife, who was injured by its use, the wife sustained an action of tort for the injury on the ground of the defendant's breach of duty. *George v. Skiving-*

ton, L. R. 5 Exch. 1. In like manner "where a stage proprietor," said Parke, B., "who may have contracted with the master to carry his servant, is guilty of neglect, and the servant sustains personal damage, he is liable to the latter; for it is a misfeasance towards him, if, after taking him as a passenger, the proprietor or his servant drives without care, as it is a misfeasance towards every one travelling on the road. So, if a mason contracts to erect a bridge, or other work, over a public road, which he constructs not according to the contract, and the defects are a nuisance, a third person, who sustains an injury by reason of its defective construction, may recover damages from the contractor, who will not be allowed to protect himself from liability by showing an absence of privity between himself and the injured person, or by showing that he is responsible to another for breach of the contract." *Longmeid v. Holliday*, 6 Eng. Law & Eq. 563. So, where a station, being in the joint occupation of the defendant and another railway, the plaintiff's decedent, a blacksmith in the service of the other railway, while engaged in repairing one of its wagons on a siding at the station, was killed by the negligent shunting of the defendant's train on that siding, a motion to set aside a verdict for the plaintiff was overruled. *Vose v. Lancashire & Y. R.*, 2 Hurl. & N. 728.

And it seems that an apothecary who administers improper medicine to his patient, or a surgeon who unskilfully treats him for his injury, is liable to the patient even when the father or friend of the patient was the contractor. *Pippin v. Sheppard*, 11 Price, 400; *Gladwell v. Steggall*, 5 Bing. N. C. 733, 35 E. C. L. 392; *Thomas v. Winchester*, 6 N. Y. 397.

The principle is sustained in the well-considered case of *Sawyer v. Rutland & B. R. Co.*, 27 Vt. 370, which was re-examined and reaffirmed by the same learned court in *Merrill v. Montpelier & W. R. Co.*, 54 Vt. 200. Also in *Smith v. New York & H. R. Co.*, 19 N. Y. 127; *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Pierce, R. R.* 274; *Patt. Ry. Acc. Law*, § 228; 2 Wood, Ry. Law, 1338, 1339 and notes. We are aware that this view is not in accordance with *Murch v. Concord R. Co.*, 29 N. H. 35, and *Pierce v. Concord R. Co.*, 51 N. H. 593, which cases were cited by a divided court in this state on another point (*Mahoney v. Atlantic & St. L. R. Co.*, 63 Me. 72); but, notwithstanding our high opinion of the learned court which pronounced these opinions, we think the views herein declared are more satisfactory. Our opinion therefore is that the plaintiff had the lawful right, as brakeman on the train of the P. & O., to pass and repass by the Bethlehem station-house of the defendant, which therefore owed a duty to him to construct and maintain its station-house there in such a reasonably safe manner that its awning would not injure him while in the per-

formance of his duty with due care ; and that a negligent breach of that duty by the defendant, having resulted in a personal injury to the plaintiff without fault on his part, he is entitled to maintain this action therefor, unless the leasing and consequent full possession of the defendant's road by the B. & L. constitutes a defence.

It is declared to be the settled law of this country that one railroad corporation cannot, without statutory authority, divest itself of, or relieve itself from, any duty or liability imposed by its charter or the general laws of the state, by leasing its road and appurtenances to another. *York & M. L. R. Co. v. Winans*, 17 How. 30; *Thomas v. West Jersey R.*, 101 U. S. 71, 83. Assuming the lease of the defendant road, station-houses, etc., to the Burlington & Lamoille to have been duly authorized by the respective legislatures of the states which granted their charter, and that the lessee had, months before the plaintiff's injury, received under the lease full possession, management, and control, was the defendant thereby relieved from liability to this plaintiff for his injury? This court has held that an authorized lease of a railroad does not relieve the lessor from the liability under the general statute, nor an injury caused to property along its line by fire communicated by a locomotive of the lessee. *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579; *Stearns v. Same*, 46 Me. 95. In Massachusetts, both lessor and lessee are held liable for the injury under a like statute. *Ingersoll v. Stockbridge & P. R. Co.*, 8 Allen, 438; *Davis v. Providence & W. R. Co.*, 121 Mass. 134. Courts of the highest respectability have held, in well-considered opinions, that the duly-authorized leasing of one railroad to another does not absolve the lessor from liability to a passenger for injury caused by the negligent acts of the lessee's employees, unless the statute authorizing the lease contains an express exemption to the lessor; that "grants to corporations, whether of powers or exemptions, are to be strictly construed, and their obligations are to be strictly performed, whether they may be due to the state or to the individuals." *Singleton v. Southwestern R.*, 70 Ga. 464, 21 Am. & Eng. R. Cas. 226; *Nelson v. Vermont, etc., R. Co.*, 26 Vt. 717; 1 Redf. 590. This view is adopted and sustained in an opinion reviewing the cases and authorities, by the court in Illinois. The court in its opinion does not rest its decision "upon the narrow ground alone of the lessee being in the exercise of a franchise which belonged to the lessor, and, in so doing, is to be held as the servant of the lessor corporation; but in consideration of the grant of its charter, the corporation undertakes the performance of duties and obligations towards the public; and there is a matter of public policy concerned that it should be

relieved from the performance of its obligations without the consent of the legislature;" adding, "there is no express exemption in the statute which authorized the lease." *Balsley v. St. Louis A. & T. H. R. Co.*, 25 Am. & Eng. R. Cas. 497. See also *Pierce*, R. 244.

In this state, where the defendant had leased its road under the authority of a statute which expressly provided that "nothing contained therein . . . shall exonerate the lessor from any duties or liabilities imposed upon it by the charter or by the general laws of the state," a divided court held that the lessee, and not the lessor, was liable to a passenger injured by an assault and wrongful expulsion from its train by one of the lessee's servants. *Mahoney v. Atlantic & St. L. R. Co.*, 63 Me. 68. This case, however, does not meet the facts in the case at bar; for there the injury complained of resulted solely in the wrongful acts of the servant of the lessee, who had sole control of the trains, and not as here from the wrong of the lessor in the negligent original construction of its depot. And herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains, and the general management of the leased road over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station-houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility. *St. Louis W. & W. R. Co. v. Curl*, 28 Kan. 622, 11 Am. & Eng. R. Cas. 458. The covenant in the lease to "save the lessor harmless," etc., is predicated of an implication of a primary liability on the part of the lessor. It is an obligation which in nowise affects the plaintiff, or the defendant's liability to him, but is simply a contract for reimbursement for such damages as may in anywise be recovered against it by the plaintiff, and other lawful claimants, whose injury results from its breach of duty owed them.

We are also of opinion that the defendant is liable, under the rule which governs the responsibility of a lessor of demised premises, for their condition; for it is settled law that, when the owner lets premises which are in a condition which is unsafe for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable—whether in or out of possession—for the injuries which result from their state of insecurity to persons lawfully upon them; for by the letting for profit, he authorizes a continuance of the condition they were

Effect of lease.

Lessor liable for defective premises.

in when he let them, and is therefore guilty of a non-feasance. Among the numerous cases supporting this general view is: *Rosewell v. Prior*, 2 Salk. 459, more fully reported in 12 Mod. 635, 639, where the defendant erected a house, thereby obstructing the plaintiff's ancient lights, and demised it to another; and the court held the "action well brought . . . for, before his assignment over, he was liable for all consequential damages, and it shall not be in his power to discharge himself by granting over." See also *Rex v. Pedly*, 1 Adol. & E. 822; *Staple v. Spring*, 10 Mass. 72; *Fish v. Dodge*, 4 Denio, 311; *House v. Metcalf*, 27 Conn. 631; *Todd v. Flight*, 9 C. B. (N. S.) 377; in the last case Earle, C. J., after reviewing *Rex v. Pedly*, and *Rosewell v. Prior*, said: "These cases are authorities for saying that, if the wrong causing the damage arise from the non-feasance or the misfeasance of the lessor, the party suffering damage from the wrong may sue him. And we are of opinion that the principle, so contended for on behalf of the plaintiff, is the law, and that it reconciles the cases." Also *Nelson v. Liverpool Brewery Co.*, 2 C. P. Div. 311; *Owings v. Jones*, 9 Md. 108; *Ganby v. Jubber*, 5 Best & S. 78, on error, Id. 486. See opinion, same case, 9 Best & S. 15; *Stratton v. Staples*, 59 Me. 94. This principle is recognized in *Campbell v. Portland Sugar Co.*, 62 Me. 552, and in *McCarthy v. Bank*, 74 Me. 315, 325; *Burbank v. Bethel Steam Mill Co.*, 75 Me. 373; *Allen v. Smith*, 76 Me. 335, 341. See also *Godley v. Hagerty*, 20 Pa. St. 387, affirmed in *Carson v. Godley*, 26 Pa. St. 111, where buildings were let to the government as bonded warehouses, and, being defectively built and of insufficient strength, they fell by reason of storage of heavy merchandise. So, in Maryland, in *Albert v. State*, 7 Atl. Rep. 697, the court of appeals approved the instruction: "If the jury found that the defendant was the owner of the wharf, and rented it to the tenant, and that at the time of the renting the wharf was unsafe, and the defendant knew, or by the exercise of reasonable diligence could have known, of its unsafe condition, and the accident happened in consequence of such condition, then the plaintiff was entitled to recover." So in *Swords v. Edgar*, 59 N. Y. 28, the court, after an elaborate review of the cases, held that the lessor of a pier in the possession of their lessee from whom they received rent for it, were liable for an injury received by a longshoreman engaged in discharging a cargo thereon, the cause of the injury being a dangerous defect, which existed at the time of the demise. In a very recent case in Rhode Island, of like facts, the court held both lessor and lessee jointly liable. *Joyce v. Martin*, 10 Atl. Rep. 620; see also the recent case in New Jersey, of *Ran-kin v. Ingwersen*, 10 Atl. Rep. 545; also a Massachusetts case, *Dalay v. Savage*, 12 N. E. Rep. 841.

We are aware that there are a few cases which hold that, even if premises are dangerous when demised, the lessor is not liable to one injured thereby if the tenant in the lease covenanted to keep them in repair. *Pretty v. Bickmore*, L. R. 8 C. P. 401. And the same principle was subsequently affirmed in a case of very similar facts. *Gwinnell v. Eamer*, L. R. 10 C. P. 658. See also *Leonard v. Storer*, 115 Mass. 86, where the lessee covenanted to "make all needful and proper repairs, both internal and external." The language of the court, when taken in connection with the facts, is explainable in consonance with the early English cases before cited. See also the *dictum* in the recent case in Massachusetts, already cited, of *Dalay v. Savage*. But this principle has been ably reviewed in the strong opinion of Fogler, J., in *Swords v. Edgar*, *supra*. This opinion declines to accept the doctrine of the above cases, for the reason that they "ignored the rule announced in *Rosewell v. Prior*, *supra*, and followed and established in many cases." Fogler, J., speaking for the whole court upon this question, said: "The person injuriously affected by the ruinous state of the premises demised has no right nor privity in the covenant. He is not given thereby a right of action against the lessee, greater nor more sure than he had before. He has the right without the covenant. The covenant is a means by which the lessor may reimburse himself for any damages in which he is cast by reason of his liability. But it is an act and obligation between himself and another, which does not remove nor suspend that liability. It is not so that a person, on whom there rests a duty to others, may, by an agreement between himself and third person, relieve himself from the fulfillment of his duty. Surely an ineffectual attempt to fulfill would not; as if, in this case, insufficient repair of the pier had been made by a builder, who had contracted with the lessor to do all that was needful to make the pier secure for all comers. A covenant taken from a lessor, to keep in order and repair, is no more effectual than a contract with a builder to the same end. Both may afford an indemnity to the lessor, but neither can shield him from responsibility." The New Jersey case of *Rankin v. Ingwersen*, *supra*, sustains the same view. And we adopt the doctrine of the case from which we have so largely quoted as sound on legal principles and public policy. And even if a lessee's covenant would, when broad enough in its terms, operate as a relief of the lessor's liability, the covenant here would not affect the case in hand, for it is restricted and limited to "maintaining, preserving, and keeping the station-houses in as good order and repair as the same now are, so that there shall be no depreciation in the general condition thereof at any time during the term."

The testimony as to the proximity of the awnings of the other

stations had a legitimate bearing on the question of the exercise of care on the part of the plaintiff; and the defendant pursued the same line of inquiry, not only on cross-examination, but in the direct examination of its own witnesses, Stowell and Winters. We think also that Sawyer's testimony was legitimate. Motion and exceptions overruled.

Peters, C.J., Walton, Libbey, Foster, and Haskell, JJ., concurred.

Negligence of Lessee—Liability of Lessor.—An engineer who receives an injury while in the discharge of his duties, by a collision with a train of another company using the same part of the road under a lease from his employer, through the negligence and recklessness of the employees of the lessee company in running the train in violation of the reasonable rules of the lessor, cannot, if he had knowledge that the track was being used for traffic by the lessee, recover damages of the company employing him, such an accident being one of the ordinary perils of the service, and not attributable to the employer's negligence. The lessor company under such circumstances does not, in the employment of its servants, impliedly contract that the employees of the lessee will observe strictly the rules adopted to secure safety in the running of trains. *Clark v. Chicago, B. & Q. R. Co.*, 92 Ill. 43.

ELLIOT

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

(*Dakota Supreme Court, February 9, 1889*).

Fellow-Servants—Same General Business—Section Foreman—Conductor.—A section foreman and a train conductor are co-employees "engaged in the same general business" within the meaning of a statute which exempts the employer from liability from injuries caused through the negligence of such fellow-servants.

Injuries to Employees—Contributory Negligence—Failure to Look and Listen.—Plaintiff's husband, a section foreman, was killed whilst a flying switch was being made. The evidence showed that the track for several miles in either direction from the place of accident, was straight and the view unobstructed; that deceased attempted to cross the track in full view of the section train which ran upon him, and not more than 20 or 30 feet from it; that it was in motion and that he was crossing the track diagonally with his back turned partly towards the section train. *Held*, that as it must be inferred from the evidence that the deceased did not look or listen before attempting to cross the track, he was guilty of contributory negligence which precluded a recovery.

Same—Evidence—Carefulness of Servant.—In an action for damages for negligently causing the death of plaintiff's husband, it is error to admit tes-

timony that deceased was considered to be a careful man, the question being whether he was free from negligence at the time the accident occurred.

APPEAL from a Judgment of the District Court of the Fourth District, in and for the County of Clay, entered in favor of the plaintiff, upon a verdict.

The action was brought to recover damages for the death of John Elliot, plaintiff's husband, alleged to have been caused by defendant's negligence. The deceased at the time of his death was in the employ of the defendant as a section foreman, and the injuries from the effect of which he died were occasioned by the negligence of other of defendant's employees in running a freight train, and while making a flying switch.

R. B. Tripp (*H. H. Field*, of counsel) for appellant.
Grigsby & Lyon, for respondent.

SPENCER, J.—This action was brought by the plaintiff to recover damages for the death of her husband, John Elliot, alleged to have been caused by the negligence of the defendant's employees. The deceased, at the time Facts. he received the injuries which resulted in his death, was in the employment of the defendant on its line of railway as a section foreman at a station called Meckling. On November 1, 1884, a freight train was approaching this station from the west, in charge of a conductor, assisted by an engineer, fireman, and others, and as it neared this station was, during the process of making a flying switch, divided into three sections, the first of which, consisting of the engine and a number of cars, passed down the main track. Some of the other cars were put upon a side track; and then the rear section of the train, consisting of four cars, including the caboose and passenger coach, was also moved down the main track. About the time the first section of the train passed down, the deceased was standing a short distance south of the main track, and, after it had passed him, he undertook to cross that track diagonally in an easterly direction, and was struck by the rear section of the train, and instantly killed. There was no evidence showing that the conductor was not a fit person for the service that he was employed in, nor was there any evidence showing that the deceased had received any order from, or was doing any act by direction of, the conductor or other person connected with the train. At the close of the evidence counsel for the defendant moved the court to direct a verdict for the defendant upon several grounds, and, among others, that if the evidence tended to show negligence it was the negligence of co-employees of the deceased, engaged in the same general business, for which no recovery could be had under section 1130 of the Civil Code. This motion was overruled, and

the defendant excepted. The court then charged the jury, and, among other things, instructed them as a matter of law that the deceased and the conductor of this freight train were not co-employees within the purview of this statute, and to this instruction the defendant also excepted. The case was submitted to the jury, who returned a verdict in favor of the plaintiff. The defendant duly moved for a new trial upon the grounds presented by said motions and exceptions, and others, which was denied. Judgment upon the verdict was entered for the plaintiff, and the defendant appealed.

The general and well-established principle of the common law, that an employer is not liable to one of his agents or servants for the negligence of another of his agents or servants engaged in the same general business, has been ingrafted in, and forms part of, the statute law of this territory, and hence, in the consideration of the question presented by the exceptions of the defendant to the ruling of the court above alluded to, we have only to determine whether the deceased and the conductor of the freight train aforesaid were co-employees of the defendant, engaged in the same general business, within the meaning of this statute. The statute does not undertake to define who are co-employees, or what is intended by the term "same general business," but merely declares the general rule of law as to the non-liability of an employer to his agents and servants in the cases mentioned, leaving it for the courts to determine when persons are co-employees, engaged in a common business. The question thus presented has frequently been considered by the courts of this country and England, and to the adjudications upon this subject we may turn for such explanation of this term as they may yield, and as demonstrating under what circumstances this rule has been applied.

A general collection of all the authorities on this subject at this time would be impracticable, and is not necessary, but a few, selected from the many, as showing the current of authority, and the general application of the principle, will be all-sufficient. It was decided as early as 1841, in South Carolina, that a section foreman who was injured by the negligence of an engineer could not recover against their common employer for the injuries thus sustained, because they were co-employees of a common master, engaged in the same general business. *Murray v. South Carolina R. Co.*, 1 McMul. (S. C.) 385. Soon after, it was determined by the supreme court of Massachusetts that an engineer who was in the employ of a railroad company, and was injured by the negligence of a switch-tender, could not recover damages against the company, the negligent employee being also in its employ.

Employer not
liable for neg-
ligence of fel-
low-servant.

Authorities
reviewed.

Farwell v. Boston & W. R. Co., 4 Metc. (Mass.) 49. This decision has since been followed by the courts of that state, and the doctrine applied where a brakeman was injured by the negligence of a track-man (*Holden v. Fitchburg R. Co.*, 129 Mass. 268, 2 Am. & Eng. R. Cas. 94), and in *Clifford v. Fitchburg R. Co.*, 141 Mass. 564, 6 N. E. Rep. 751, where the injuries were sustained by a section-man, and were occasioned by the negligence of an engineer, both in the service of the company. The courts of New York have held a similar rule, and applied it in the instances following: Where a section-man was injured by the negligence of a train-man (*Coon v. Syracuse, etc., R. Co.*, 5 N. Y. 492); where a brakeman was injured through the carelessness of an engineer (*Boldt v. New York Cent. R. Co.*, 18 N. Y. 432); where a shoveller was injured by the negligence of train-men (*Henry v. Staten Island R. Co.*, 81 N. Y. 373, 2 Am. & Eng. R. Cas. 60); where a fireman was killed because of the negligence of a switchman (*Harvey v. New York Cent. R. Co.*, 88 N. Y. 481, 8 Am. & Eng. R. Cas. 481). In Illinois, the rule was applied in the case of a car-repairer injured by the negligence of an engineer (*Valtez v. Ohio & M. R. Co.*, 85 Ill. 500); and in Pennsylvania, in the case of a section-man and engineer (*Keyes v. Pennsylvania Co.*, 3 Atl. Rep. 15); in Wisconsin, in the case of a shoveller and conductor (*Heine v. Chicago & N. W. R. Co.*, 58 Wis. 525); in Minnesota, in the case of an engineer and station agent (*Brown v. Minneapolis & St. L. R. Co.*, 31 Minn. 553, 15 Am. & Eng. R. Cas. 333); in Indiana, where a section-man was injured through the negligence of an engineer (*Gormley v. Ohio & M. R. Co.*, 72 Ind. 31, 5 Am. & Eng. R. Cas. 581); and also where a track-man was injured by negligence of engineer (*Capper v. Louisville, E. & St. L. R. Co.*, 103 Ind. 305); and in many of the other states. In all of them where the subject has been considered by the courts, except Tennessee, the rule has been applied in like cases; and, finally, the United States supreme court, in the case of *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, has held it to be the established law, and applied it to the case where a switchman was injured through the negligence of an engineer. In the latter case Mr. Justice Gray delivered the opinion of the court, and in discussing the relations of these persons, and whether they were engaged in a common business, used the following language: "They are employed and paid by the same master. The duties of the two bring them to work at the same place at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object, the moving of the trains. Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other

in performing his service; and neither can maintain an action for an injury, caused by such negligence, against the corporation, their common master." This opinion was concurred in by all the members of the court, and would seem to be decisive of the question under consideration. In the case at bar the character of the labor which the deceased was engaged to perform required him to be on and about the track to keep it in proper condition for running trains over it, and placed him in situation where he was liable to be injured by passing trains. All of the duties which he was employed to perform necessarily required his presence on the track, and all the risk to which he was exposed arose from the nature of the employment which he took upon himself.

Some of the cases differ as to the reason of the rule, but there is no conflict of opinion as to its application to employees of a common master, at work for the accomplishment of a single purpose. It is sufficient within these cases to command the application of the rule, if the end to be obtained by the labor of the several employees under a common master is the same, to constitute them fellow-servants engaged in the same general business, though the services rendered may be different in kind, and rendered separately and independently of each other. It was in this manner, and for the achievement of a common purpose,—the moving of trains over defendant's road,—that the conductor of this freight train and the deceased were employed. Both were in the employ of and paid by the same master, both were engaged in the service of operating a railroad,—the conductor in managing trains passing over the road, and the deceased in keeping such road in repair and condition for the transportation of trains over it,—both receiving orders from some officer of the defendant superior to either. Neither performed his work under the direction of the other, nor was he under the control of the other. From the character of the duties each had to perform in promoting the common object of their employment, they were brought together as co-employees, neither being superior to or representing the common employer more than the other. True, one of the rules of the defendant, which was put in evidence, provides that in case of accident or delay track foremen shall obey orders from the conductors, but there is no evidence showing that the deceased had received or was executing any orders from the conductor of the freight train, or other person connected with it; on the contrary, the reasonable presumption from all the evidence and circumstances is that he had not received any orders from the conductor, and that his act in crossing the track was entirely voluntary on his part.

Section fore-
man and train
conductor are
fellow-ser-
vants.

The counsel for the respondent has argued with much ingenuity that the general rule of law as it has been heretofore understood has been so modified by the decision of the court in the case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501, as permits a recovery by the plaintiff in this suit. Chicago, M. & St. Paul R. Co. v. Ross.

We do not think that the decision in that case supports plaintiff's position. It modifies and limits to some degree the extent to which the rule is applicable, and holds, substantially, that an employee of a railroad company may, under some circumstances, and as to some persons, become a representative of his employer to such an extent as to render his principal liable for his negligent acts; and that a conductor of a railroad train, having a right to command its movements and control the other persons employed upon it, as to such persons may cease to be a fellow-servant, while he remains in charge of such train, and may, under some circumstances, during such time, become a representative of the company. This decision modifies the rule as laid down in *Sherman v. Rochester & S. R. Co.*, 17 N. Y. 153, and other like cases. But we do not understand it overrules the general rule of law that where several persons are employed in the same general service, by a common employer, and one is injured by the negligence of the other, the employer is not responsible. The facts and circumstances of that case were unlike the case at bar. There the conductor was charged with a special duty, which it was incumbent upon his employer to perform, and which he neglected to render. The engineer, the injured person, was subject to his command. Here it is expressly proven, and uncontradicted, that the conductor had no authority or control over the deceased. He was not then a superior over the deceased, and, as to him, did not represent the defendant.

The case of *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 24 Am. & Eng. R. Cas. 407, also relied upon by the respondent, is not applicable here. That case decides that under section 1131 of the Civil Code a railroad company is liable to one of its employees—a brakeman—for the negligence of another employee—a car repairer—in failing to keep in proper repair certain appliances used by the injured person in the transaction of the business of the company, which he was employed to do, and he was held not to be in the same business as the brakeman, who was injured by the use of a defective car. It was the duty of the company to provide safe machinery and appliances. The facts in these cases, and the grounds upon which the decisions rest, are clearly inapplicable to support respondent's position here, nor do they militate against the doctrine laid down in *Randall v. Baltimore & O. R.* Northern Pac. R. Co. v. Herbert.

Co., *supra*, though the decision in the Ross Case was made subsequently.

The case of *Garrahy v. Kansas City, St. J. & C. B. R. Co.*, 25 Fed. Rep. 258, as reported, would seem to support respondent's position here. But in this regard it is apparently in conflict with *Randall v. Baltimore & O. R. Co.*, *supra*, though the learned judge who wrote the opinion in the former concurred in the decision in the latter, in which the court was unanimous; and the law as there pronounced must be taken and accepted as the law of this territory. Several other decisions of the circuit courts have been cited by respondent as sustaining his view, but upon examination it will be found that they all proceed upon the doctrine of superior authority or control of one employee over another, or upon the negligence of the employer or person charged by him with the performance of a duty owing to the employee.

There is no pretense in the case at bar that the appellant failed to discharge any duty owing by it to the deceased, or that the company was negligent in the employment of, or retention in its service of, the conductor who had charge of the train. It is not, therefore, within the purview of section 1131, nor within the exception to section 1130. On the contrary, it comes directly within the exemption defined by section 1130, and within the doctrine of the common law, as stated in *Randall v. Baltimore & O. R. Co.*, *supra*. Since the decision in the *Garrahy* Case the question here involved has been before several of the circuit courts of the United States, and the decision in the *Randall* Case adhered to and followed. Thus, in *Van Wickle v. Manhattan R. Co.*, 32 Fed. Rep. 278, it was held that a track repairer and an engineer were co-employees, and that the company was not liable to the former for an injury resulting from the negligence of the latter. Coxe, J., in his opinion, after referring to the *Garrahy* Case, says: "Recognizing the marked lack of unanimity among the decisions, it may still be confidently affirmed that the proposition that persons holding the relation that this plaintiff and the engineer held to each other are fellow-servants is maintained by a great preponderance of authority," and in support of this view he cites *Randall v. Baltimore & O. R. Co.*, *supra*; *Boldt v. New York Cent. R. Co.*, *supra*; *Vick v. New York Cent. R. Co.*, 95 N. Y. 267, 17 Am. & Eng. R. Cas. 609; *Brick v. Rochester, N. Y.*, etc., R. Co., 98 N. Y. 211, 21 Am. & Eng. R. Cas. 605; *Quinn v. New Jersey Lighterage Co.*, 23 Fed. Rep. 363. So, in *Easton v. Houston & T. C. R. Co.*, 32 Fed. Rep. 893, the United States circuit court, in Texas, made a similar ruling, *Pardee, J.*, in his opinion, using the following language: "As federal authorities sustaining the finding of the master I have been referred to the case of *Chicago*,

Review of later
authorities.

M. & St. P. R. Co. v. Ross, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501, which holds that 'a conductor of a railroad train, who has the right to command the movements of the train, and to control the persons employed upon it, represents the company while performing those duties, and does not bear the relation of fellow-servant to the engineer and other employees of the corporation on the train,' and to the later case of *Northern Pac. R. Co. v. Herbert*, 116 U. S. 648, 24 Am. & Eng. R. Cas. 407, where it was held that a brakeman and the officer or agent of the company charged with the duty of keeping the cars in repair were not fellow-servants within the common-law rule. These cases were decided by a divided court. In the case of *Ross* the vice-principal doctrine is recognized, and in the case of *Herbert* the fellow-servant negligence rule is modified by limiting the application of the rule to employees in the same department of service; and under this latter authority I can well see how the master might conclude in this case that, as the section hand and the locomotive engineer are in separate departments, they are not fellow-servants assuming the risk of each other's negligent acts. I am, however, of the opinion that neither of these cases is applicable to the facts of the present case. Whatever may be, as a general rule, the duties of the section hand, as distinguished from the duties of those railroad employees running trains and locomotives, at the time of the complainant's injury he was running a car on the road, and his duty and employment brought him in direct connection and relation with the employees running the special train causing the injury. Both were using the tracks of the railway at the same time, and so near to each other that the conduct of the one necessarily affected the comfort and safety of the other. At that time, it seems to me, they were fellow-servants in the same general department, governed by the same rules, and respectively charged with the ordinary risks of each other's negligent acts. The case of *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 15 Am. & Eng. R. Cas. 243, by a unanimous court, seems to me to be directly in point." And again, in *Naylor v. New York Cent. & H. R. Co.*, 33 Fed. Rep. 801, the circuit court of the northern district of New York held that an engineer and switchman were fellow-servants. Wallace, J., said: "The switchman and the deceased engineer were not only co-employees of the defendant, but they were each engaged in duties which brought them to work at the same place, at the same time, under circumstances in which the carelessness of one might be fatal to the safety of the other." The decision in each of these cases was placed upon the authority of *Randall v. Baltimore & O. R. Co.*, *supra*. Upon reason and authority, therefore, we are of opinion in the case under consideration that the conductor and the deceased were co-employees,

and engaged in the same general business, and that the trial court erred in holding otherwise.

Did the negligence of the deceased contribute to the accident which resulted in his death?

James Kennedy, one of the witnesses sworn in behalf of the defendant, testified as follows: "We commenced pushing the car out of the way of the approaching car that was coming onto the side track. We commenced pushing, and the

**Testimony of
witnesses.**

next thing I heard Mr. Elliot holler. I thought it was him. . . . When Elliot hollered to me he was 10 or 12 feet west of the car-house. At that time I was right opposite on the side track,—right across from him. . . . The train was coming from the west. They made what I should call a 'flying switch,' to the best of my judgment. Part of the train came down the main track with the engine, and part came in on the side track, and another part came on the main track. The last part was the part that struck Elliot. I saw the train after it struck him. I helped to get him out from under the cars. It was the last section that struck him,—the last part on the main track. The first part was on the main track, and the middle part was sent off on this side track."

H. C. Smith, a witness for plaintiff, also testified as follows: "I was acquainted with Elliot; worked under him in his gang about seven months. I was present the morning this accident occurred. Just before the accident, Elliot and I were talking, about twenty-five feet west of the car-house, before the train came down, and when the engine went by us I started west and he started east. He got as far as ten or fifteen feet from the car-house, when he stepped across the track. I should judge that is about as far as he got. I went west toward the depot. I did not go on the depot platform until I looked around, and saw a man under the train. I did not know it was him at the time. I did not see him struck. . . . When Elliot and I were talking we were not on the track. We were on the south side, four or six feet from the track. I mean that he crossed from the south side to the north side. I saw him cross the south rail. I did not pay any attention whatever. I thought he got across all right. Cross-examination. This accident was a little after eight o'clock in the morning. It was a clear morning. There was nothing on the track to obstruct the view from where I and Elliot stood by the track. At the time we were standing there I knew this train was in, or about in. While I was standing there with Elliot, the front part of the train pulled past me, down to the east. I did not notice any cars attached to the engine in the front part. I would not be positive of that. I recollect two cars set in on the south track. I don't know what the men on the hand-car were doing while Elliot and I were

standing there. I did not notice them doing anything during that time. Just before that, I was running with the section force. I had another man in my place that day. I belonged with the force. I was going away that day, and was talking with Elliot just before leaving to go down and get on the train. The first that I noticed the rear end of the train coming down the track was just as it run in on the switch, coming in on the main track, the rear end of it, after the car went in on the side track, and as I turned and left Elliot to come up towards the depot. It was about opposite to the depot when I started to go west. As I went west towards the depot it came down the track, and immediately passed me. The last I saw of Elliot before the accident happened was when I turned to look and he was just in the act of stepping over the south rail. At that time he was across the south rail. I saw him. He was stepping across. At that time I was ten or fifteen feet from where I was talking with him. The last I saw of Elliot he was stepping across the rail. At that time the train must have been most down to Elliot. I should judge the car was about twenty-five or thirty feet from Elliot when he crossed the rail. The last I saw of Elliot before the accident was at that time. This was the front car of the rear part of the train. It was on the main track."

Charles M. Taylor, sworn for plaintiff, testified: "There were at that time no buildings between the depot and car-house, on the map here, about two hundred feet east of the depot. The ground is level,—the whole station ground. It is pretty near level for six miles west and four miles east. It is level, you might say, all the way,—only one foot between there and Garyville,—six miles. The road is straight for about six miles west. Standing down here by the car-house, looking west, the ground is level,—plain to be seen. There is nothing to interrupt the view from the car-house up above the west switch. It was a pleasant morning. Don't recollect whether it was sunshiny or cloudy. We could see all around,—a good, bright morning."

W. J. Welsh, sworn for defendant, testified: "The first I saw of Elliot he was on the main track. He was running slowly, angling on the track,—crossing the track at an angle. The front end of the rear section of the train at that time I should judge was about half a car-length from him. As soon as I saw him I hollered to him to get off. I told him to get off the track, or he would get run over. I did not have time to say it a second time, when the car struck him."

This is substantially all the evidence in the case throwing any light on the conduct of the deceased at the time of the accident, and it shows conclusively, and is undisputed, that the morning on which the accident occurred was clear; that the track for

several miles in either direction from the place of accident was straight, and the view unobstructed; that the deceased attempted to cross the main track with the rear section of the train—the one which ran upon him—in full view, and not more than 25 or 30 feet from him; that it was in motion; and that he was crossing the track diagonally, with his back turned partly towards the rear section of the train. There is no pretense that he looked or listened. The conclusion from the evidence is irresistible that he did not look or listen before the attempt to cross the track; or, if he did, that he voluntarily, and with full knowledge of the danger he was incurring, unnecessarily placed himself in a position of peril and immediate danger. In either event, his negligent conduct in this regard,—failing to know of the hazard he was taking upon himself, when to have had actual knowledge of it he had only to look or listen; or, knowing of the danger, deliberately and of his own volition unnecessarily assuming such risk,—was negligence which, under the circumstances, must inevitably have contributed to the injury complained of. *Chicago & N. W. R. Co. v. Donahue*, 75 Ill. 106; *Ernst v. Hudson R. R. Co.*, 39 N. Y. 61; *Weber v. New York Cent. & H. R. R. Co.*, 58 N. Y. 451; *Baltimore & O. R. Co. v. De Pew*, 40 Ohio St. 121, 12 Am. & Eng. R. Cas. 64; *Simmons v. Chicago & T. R. Co.*, 110 Ill. 340, 18 Am. & Eng. R. Cas. 50; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439. Nor was it any excuse for the failure of the deceased to look and listen that the defendant was making with its train what is known as a “flying switch.” It was his duty, nevertheless, to have exercised his ordinary faculties to ascertain if there was danger in the attempt to cross the track, and, if there was, to desist. *Ormsbee v. Boston & P. R. Co.*, 14 R. I. 102; *Grethen v. Chicago, M. & St. P. R. Co.*, 22 Fed. Rep. 609, 19 Am. & Eng. R. Cas. 342; *Haley v. Railroad Co.*, 7 Hun, 84; *Myers v. Indianapolis & St. L. R. Co.*, 113 Ill. 386. It is doubtless a well-established rule of law that the question of concurrent negligence ought generally to be submitted to the jury. *Poler v. N. Y. Cent. R. Co.*, 16 N. Y. 476; *Keating v. N. Y. Cent. & H. R. R. Co.*, 49 N. Y. 673; *Butler v. Milwaukee & St. P. R. Co.*, 28 Wis. 487. But when the facts are undisputed, and contributory negligence is established, the question becomes one of law, and the plaintiff may be nonsuited, or a judgment given for the defendant. *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697; *Schofield v. Chicago, M. & St. P. R. Co.*, 114 U. S. 615, 19 Am. & Eng. R. Cas. 353; *Morrison v. Erie R. Co.*, 56 N. Y. 302. The evidence in this case is incapable of but one construction,—that the negligence of the deceased contributed to the injury complained of. The court should therefore have

granted defendant's motion, and directed a verdict for the defendant.

Upon the trial of the cause the plaintiff was permitted, against defendant's objection, to ask several of the witnesses sworn in his behalf the following question: "Was Mr. Elliot a careful or a careless man in guarding himself and employees from danger from passing trains?"—to which it was usually answered that he was a careful man. We think that the trial court erred in overruling appellant's objection to this question, and permitting the witnesses to answer. It was an important issue in the case whether the negligence of the deceased contributed to the injury. The correct determination of this question could not be made to depend upon the fact of whether the deceased was usually careful or careless, but upon his conduct at the time of the accident. However careful he may have been generally would be of no avail to him if this negligence in fact contributed to the injury, and, however careless he may have been usually would not have been any defence to this action had he been free from negligence at the time the accident occurred. *Chase v. Maine Cent. R. Co.*, 77 Me. 62, 19 Am. & Eng. R. Cas. 356; *Morris v. East Haven*, 41 Conn. 252; *Philadelphia, W. & B. R. Co. v. Stebbing*, 49 Am. Rep. 628; *McDonald v. Savoy*, 110 Mass. 49. There are some cases holding that such evidence is proper when there were no eye-witnesses of the accident, and no evidence in regard to the negligence or want of negligence of the person injured at the time of the accident. These cases proceed upon the theory that courts will presume upon proof of general habits of carefulness, or the contrary, when from the nature of things it is impossible to obtain better evidence that the injured person was or was not negligent at the time of the accident which resulted in the injury; or, from the natural instinct of self-preservation, sought to save himself. *Chicago, R. I & P. R. Co. v. Clark*, 108 Ill. 113, 15 Am. & Eng. R. R. Cas. 261; *Cassidy v. Arigell*, 12 R. I. 447. But this rule has never been extended to any case when there were eye-witnesses to the accident. The facts in these cases are entirely dissimilar to those in the case at bar, and the doctrine there enunciated is not applicable. This evidence was submitted to the jury without explanation, or direction to disregard it, and it is obvious that the defendant may have been prejudiced by it, and that the jury may have attached great importance to it. For these reasons the judgment of the court below must be reversed, and a new trial ordered. All the justices concurring, except Justice Palmer, dissenting.

Reputation of
deceased for
carefulness.

ON REHEARING.

Upon the petition of the respondent a reargument of the appeal in this action was ordered, and the case reheard at the May term, 1888, at Yankton. The *personnel* of the court had changed somewhat since the former argument, Judges Palmer and Francis having retired, and been succeeded by Judges Carland and Rose. After such reargument, the court filed the following *memoranda* in the cause:

PER CURIAM. Upon a reconsideration of this case we are unable to discover any reason for change in the conclusion arrived at upon the former argument, and as announced in the opinion of the court by Mr. Justice Spencer. For the reasons in said opinion stated, the judgment appealed from must be reversed, and a new trial ordered.

All concur.

Section-hands and Laborers on Track Injured through the Negligence of a Conductor are his Fellow-servants.—In Maryland it has been held that the conductor of a railroad train occupies the position of a fellow-servant of a laborer repairing the track injured through the negligence of such conductor. *Cumberland, etc., R. Co. v. Scally*, 27 Md. 589. And in a Wisconsin case it appeared that the plaintiff, with a large number of other men, was at work for a railroad company "surfacing tracks;" that is, filling the dirt and gravel between the ties and dressing up the surface. The gravel used was brought by a train of flat cars in charge of a conductor and the usual train hands. It was the duty of the men engaged in "surfacing" to get upon the cars when the gravel train came up and shovel off the gravel. The men engaged in "surfacing" were not otherwise connected with the train. *Held*, that the conductor of the train of flat cars was a fellow-servant of the plaintiff, and that consequently the plaintiff could not recover against the company for an injury resulting from the negligence of the conductor in starting the train too quick. *Heine v. Chicago & N. W. R. Co.*, 58 Wis. 525.

Who are Fellow-servants—Connecting Companies.—Plaintiff's intestate was employed by the New York, L. E. & W. R. Co. as an ash-man, and while at work cleaning out the ash-pit of a turn table belonging to that company, was injured through the negligence of the hands in charge of an engine belonging to the Tioga R. Co., which had permission from the other company to use the track and turn table for reversing its engine. In an action against the Tioga R. Co. to recover damages, *held*, that the deceased and the employees of the Tioga R. Co. were not fellow-servants so as to relieve the defendant from liability for the accident. *Sullivan v. Tioga R. Co. (N. Y.)*, 20 N. E. Rep. 569.

Same—Loading and Inspection of Cars.—A railroad company fulfils its duty to servants in its employ when it furnishes perfectly safe cars and appliances, and provides a system of inspection of cars and proper persons to inspect them before they are taken away. A failure to inspect, or, if inspection be made, a failure to rectify the improper loading of a car by which a brake is rendered useless, is not a failure of the master to fulfil his duty to his servant, but is the negligence of a fellow-servant in carrying out the orders of the master and gives no right to recover for injuries caused thereby. The liability of the company is not altered by

the fact that the car was loaded by the servants of the owner of the freight which was placed upon it. *Byrnes v. New York, L. E. & W. R. Co.* (N. Y.), 21 N. E. Rep. 50.

Same—Yard Inspector—Yard Foreman.—It was the duty of the yard-inspector to inspect all cars immediately on arrival in the yard, and if he found a trifling defect to repair it; but, if a serious one, to mark the car "B. O." It was then the duty of the yard foreman to remove the car so marked to the repair tracks. The yard foreman and yard inspector had independent duties, and neither was subject to the orders of the other. *Held*, that they were fellow-servants, and that neither could recover for the other's negligence. *St. Louis, I. M. & S. R. Co. v. Rice* (Ark.), 11 S. W. Rep. 699.

Same—Fireman—Locomotive Engineers.—A fireman cannot recover for an injury caused by the negligence of the locomotive engineer, the latter being his fellow-servant. *Gulf, C. & S. F. R. Co. v. Blohn* (Tex.), 11 S. W. Rep. 867.

Same—Locomotive Engineers on Different Trains.—Locomotive engineers engaged in operating different locomotives, are fellow-servants, and in Colorado a railroad company employing them is not liable for personal injuries sustained in a collision caused by the negligence of one of them. *Van Avery v. Union Pac. R. Co.*, 35 Fed. Rep. 40.

Same—Province of Jury.—The question whether a section-hand and those in charge of a construction train were fellow-servants at the time when an accident occurred resulting in the death of the former, is a question of fact to be determined by the jury. *Chicago & A. R. Co. v. Kelley* (Ill.), 21 N. E. Rep. 203.

GALVESTON, HARRISBURG AND SAN ANTONIO R. CO.

v.

FARMER.

(*Texas Supreme Court, February 26, 1889.*)

Fellow-servants—Brakeman—Station Agent.—The brakeman of a freight train is the fellow-servant of a station agent who has control over the company's station, including the freight business, with power to employ and discharge hands on duty at the station, but without any power to employ or discharge the servants operating trains upon the road. He is not therefore entitled to recover for injuries received while coupling cars improperly loaded under the observation of such station agent.

APPEAL from District Court, Colorado County.

Action by George L. Farmer against the Galveston, Harrisburg & San Antonio R. Co. to recover damages for personal injuries. Defendant appeals from a judgment for the plaintiff.

Brown & Dunn for appellant.

Foard, Thompson & Townsend for appellee.

GAINES, J.—This was an action for personal injuries brought by appellee against appellant. The appellee was a brakeman on a freight train of the appellant company, and,

Facts.

having reached the station at Columbus, it became his duty to make the coupling of certain cars which were standing there, and which were ordered to be incorporated into the train. One of these cars was laden with lumber, and it is claimed that it was negligently loaded. The lumber at one end of the car projected some 20 inches or more, so that it occupied the space which is ordinarily allowed between the cars when connected, to enable the brakemen to make the coupling with safety. There was much testimony as to causes which led to the injury, bearing upon the question of negligence on part of the plaintiffs. This testimony, in view of the disposition we shall make of the case, we deem it neither necessary nor proper to consider. The lumber was loaded by the servants of one Tolliver, the owner of a lumber-yard, on a side track near the station. There is nothing to show that Tolliver bore any other relation to the company, except that of a shipper. He was examined as a witness for the plaintiff, and it is to be presumed that if any other relation existed it would have been proved. It does appear that the car was placed by the company's servants upon the side track for the purpose of being loaded, and that after it was loaded one Littlefield, the station agent of defendant, gave Tolliver a bill of lading for the lumber. It is also to be inferred from the testimony that the agent directed the car as loaded by Tolliver to be incorporated into the train. There was also evidence conducing to prove that the station agent had control over the company's station, with power to employ and to discharge hands on duty at the station. He had, however, no power to employ or discharge the servants who were operating the trains upon the road.

Such being a brief statement of the evidence tending to show negligence on part of the company's agents and servants, the court, at the request of the plaintiff, gave the following charge: "If the jury believe, from the evidence, that the plaintiff herein, at the time of

**Instructions
given at plain-
tiff's request.**

the accident complained of, was in the employ of the company as brakeman on one of its freight trains; that while so employed, and in the line of his duty, he received the injuries stated in the petition, resulting from being struck by a piece of lumber which extended over the platform of a flat car, loaded, with lumber, which he was attempting to couple; and you further believe that there were other persons in the employ of the defendant, whose duty it was to examine cars which were loaded, and to see that they were properly loaded, before the company allowed them to be received; and that such other person had

general authority and control over defendant's freight business at the time and place where the accident occurred, with authority to employ and discharge hands in connection with said business,—then the court instructs the jury, as a matter of law, that the plaintiff and such other persons were not fellow-servants, engaged in the same grade or line of service, within the meaning of the law which holds that the master is not liable for injuries to one servant on account of the negligence of a fellow-servant."

The giving of this charge is assigned as error. In the case of *St. Louis, A. & T. R. Co. v. Welch*, 10 S. W. Rep. 529 (decided at the last Tyler term), we reluctantly yielded to a former decision of this court (*Dallas v. Gulf C. & S. F. R. Co.*, 61 Tex. 196, 21 Am. & Eng. R. Cas. 575), and to the great weight of authority, and held that the fact that the employees of a railroad company were engaged in different and distinct departments of the company's service did not take them out of the rule which exempts the master from liability for injuries resulting to one servant from the negligence of his fellow-servant. In that case, the plaintiff was engaged with a bridge gang employed in repairing the bridges along the line of the road, and was injured through the negligence of the employees engaged in the transportation department, and operating a train along the line. The departments were distinct, and the duties of the servants were such that the one had practically no opportunity of observing and reporting any negligence on the part of the other. It presented a strong case for making an exception to the rule. The decision in that case is decisive of the question of the correctness of the charge now under consideration, in so far as the jury were instructed that service in different departments affected the defendant's liability in the case.

Liability of master for negligence of fellow-servants in different departments.

But we think this would have been harmless, if the other proposition in the charge, upon which the exception to the general rule as to fellow-servants is predicated, had been correct. It would simply have imposed the burden upon the plaintiff of proving a fact he was not required to establish in order to make out his case. But is it true that an employee who has the right to employ and discharge other employees of the master under him is not the fellow-servant of a servant of the same master whom he has no power to discharge? We think not. We have found no case in this court which announces this doctrine. In *Wall v. Railway Co.*, 4 Tex. Law Rev. 36, the commission of appeals say: "The general test applied is as to whether such employee has the power to employ and discharge the servants who are subject to his control and direction. An agent having such

Vice-principal—Person having power to employ is.

authority has been generally considered, as far as the servants under his control are concerned, as in legal effect occupying the position of the master." To a limited extent the rule so laid down is correct. When the duty which the agent is required to perform is a direct obligation, which the master owes to all his servants, the doctrine is applicable. It is the duty of a railroad company to furnish safe tracks and machinery, and it is responsible to its servants for the neglect of this duty on the part of such servants or agents as it may intrust with its performance. *Houston & T. C. R. Co. v. Dunham*, 49 Tex. 181; *Texas M. R. Co. v. Whitmore*, 58 Tex. 276, 11 Am. & Eng. R. Cas. 195. It is also the duty of the master to select careful and skilful servants; and if he has failed to exercise due care in the employment of a servant, and another is injured through the negligence or incompetency of the servant so employed, the master is liable. Should the master devolve this duty of employing servants upon any one of his agents or employees, and if such agent or employee fall to exercise proper care in the selection of a servant, and an injury results to another servant from such failure, the master is liable, without regard to grade of service of the employing agent or the party injured. For the failure to discharge his immediate duty to his servants the master cannot absolve himself from liability by devolving that duty upon another servant. The servant intrusted with the duty is held the representative of the master.

In the case before us there is no complaint of any defect of machinery, or of a want of care in the employment of any servant whose negligence caused the injury. The car upon which the lumber was loaded was neither defective in construction nor out of repair. The negligence consisted in loading the lumber in an improper manner. Conceding that it was the duty of the station agent to see that it was properly loaded before it was ordered into the train, this was a duty he owed as a servant merely, and not as the representative or vice-principal of the company. The plaintiff did not even bring himself within the rule quoted above from the opinion in *Wall v. R. Co.* While the station agent had power to employ and discharge hands engaged for service at the station, it appeared that he did not have power to employ or discharge train men, and it did not appear that they were subject to his control as to the manner of performing their duties. We are not prepared to say, however, that the rule referred to is a general rule, and that it should not be limited as hereinbefore indicated. The train men are ordinarily under the control of the conductor, and yet this court holds that they are fellow-servants. *Robinson v. Houston & T. C. R. Co.*, 46 Tex. 540. In an able opinion the supreme court of Minnesota

Station-agent
and brakeman
are fellow-
servants.

holds that a station master is the fellow-servant of the engineer on a passing train. *Brown v. Minneapolis & St. L. R. Co.*, 31 Minn. 533, 15 Am. & Eng. R. Cas. 333. See also *Rains v. St. Louis, I. M. & P. R. Co.*, 71 Mo. 164, 5 Am. & Eng. R. Cas. 610; *Besel v. N. Y. Cent. & H. R. R. Co.*, 70 N. Y. 171. We think the court erred in giving the charge under consideration, and for the error the judgment is reversed, and the cause remanded.

Brakeman Injured through Negligence of Station Agent in Making up Train is the Fellow-servant of the Latter.—This was decided by the supreme court of Massachusetts in the case of *Hodgkins v. Eastern R. Co.*, 119 Mass. 419. Chief Justice Gray said: "The making up of the train of cars with platforms of unequal height was the act of fellow-servants of the plaintiff, for which, by the well-settled law of this commonwealth, he can maintain no action against the corporation. *Farwell v. Boston & Worcester Railroad*, 4 Met. 49; *Hayes v. Western Railroad*, 3 Cush. 270; *Albro v. Agawam Canal*, 6 Cush. 75; *Gilshannon v. Stony Brook Railroad*, 14 Gray, 446; *Gilman v. Eastern Railroad*, 10 Allen, 233; *Johnson v. Boston*, 118 Mass. 114."

Fellow-servants—Engineer and Fireman—Section-hand.—The engineer and fireman of a passenger train are not fellow-servants of a section-hand. *Sullivan v. Missouri Pac. R. Co. (Mo.)*, 10 S. W. Rep. 852. In this case, the court said: "The point made, that the deceased was a fellow-servant with those in charge of the train and for that reason plaintiff cannot recover, cannot be sustained. We have held that a car-repairer at a station and a train-man are not fellow-servants within the meaning of a rule that exempts the company from liability to a servant for injury occasioned by another servant. (*Condon v. Railroad Co.*, 78 Mo. 567.) Nor are a section-foreman and switchman fellow-servants (*Hall v. Railroad Co.*, 74 Mo. 298). The rule of exemption is based upon the assumption that the servants are engaged in a common employment. While there is much diversity of opinion as to what will, and what will not, constitute a common employment, this section-man and the servant in charge of the passenger train were engaged in different departments of the general business in which the defendant was engaged, and were not fellow-servants. Cases are cited which go further and hold that servants are not fellow-servants where the relation is much more intimate than that of the deceased and persons in charge of the train in question, but we confine our present ruling to the facts of the case before us."

Same—Laborer—Track-walker and Conductor.—A laborer employed by a railroad company to remove snow and other obstructions from its track is the fellow-servant of a track-walker whose duty it is to see that the track is clear, and also of the conductor of a train. *Fagundes v. Central Pac. R. Co. (Cal.)*, 21 Pac. Rep. 447. The court said: "The question to be determined is whether or not the Central Pacific R. Co. is responsible for the carelessness of the conductor and track-walker. If they are to be held as the fellow-servants of the deceased, and engaged about the business of their common master, in the same general employment, then the company would not be responsible, unless the record shows that the defendant neglected to use ordinary care in the selection of the conductor and track-walker. *Civil Code*, § 1970; *Stephens v. Doe*, 73 Cal. 28; *McLean v. Blue Point Gravel Mining Co.*, 51 Cal. 257; *Fisk v. Central Pac. R. Co.*, 72 Cal. 42; *Brown v. Central Pac. R. Co.*, 72 Cal. 523. There is nothing in the evidence which tends to show any negligence on the

part of the defendant in the selection of the employees whose carelessness caused the casualty. Neither the conductor nor track-walker is shown to have had anything to do with the selection of employees for the company, nor is it made evident that either of them was in any sense managing assistant for it in the conduct of its general business as a railroad company. They had with the laborer who was killed certain duties to perform as employees of the company, in the same general business. The conductor ran the train; the track-walker was to see that the track was clear of obstructions, and to signal when they existed; the laborer was engaged on his part in helping to keep the track in good order, so that the trains might run upon it in safety. They all must have known the dangers incident to their employment. They were fellow-servants of the same employer, and employed by it in the same general business. The deceased met his death through the negligence of the conductor and track-walker, and not that of the railroad company, which, therefore, is not responsible."

Same—Surface Hand—Engineer and Conductor of Wild Train.—The rules of a railroad company provided that "trains are to be run under the direction of the conductor except when such direction involves the risk of hazard, in which case the engineer will have equal responsibilities." *Held*, that a laborer employed in surfacing the track and the engineer and conductor of a 'wild train' were not fellow-servants. *Northern Pac. R. Co. v. O'Brien* (Wash.), 21 Pac. Rep. 32. The court said: "Admitting that the collision was caused by the gross negligence of the conductor and engineer of the 'wild train,' it is contended on behalf of the plaintiff in error that under the rule which exempts the master from liability to a servant for injuries caused by the negligence of a fellow-servant, in the same common employment, the railroad company cannot be held responsible to the defendant in error in this case. This, it seems to us, presents the only question of real difficulty in this case. If the conductor and engineer were fellow-servants of the laborers working on the track, and engaged in the same common employment, then the company is not liable to the defendant in error for the injuries he received in the collision. The general rule of law on this subject is well settled; but as it was interpreted in the *Farwell Case*, 4 Metc. (Mass.) 49, and in the other cases following the *Farwell Case*, its injustice long ago became so manifest, and was so frequently dwelt upon, both by text-writers and courts, that in recent years the courts have shown a strong tendency to graft important limitations upon the general doctrine. In some of the states the legislatures have abolished the rule altogether; and in England the rule was carried to such an extent that in 1880 parliament felt called upon to interfere, and the result was the 'employers' liability act.' It is not, however, our purpose to review the authorities upon this rule, or to discuss it at any length, for we think the recent decisions of the supreme court of the United States upon this subject are decisive of this case; and as the amount involved is large enough to bring the case within the jurisdiction of that court, if we err in our decision, we have no doubt the losing party will take the case to the supreme court for review and correction.

"In our view, then, of the law, the conductor and engineer of the 'wild train' were not fellow-servants of the laborer O'Brien, the defendant in error in this case, or engaged in the same common employment with him. One of the rules of the Northern Pacific R. Co. expressly provided that 'trains are to be run under the direction of the conductor, except when such direction conflicts with these rules, or involves risk or hazard, in which case the engineer will be held equally responsible.' These men were not only engaged in totally different departments of work, but they

stood in a different relation to their common principal. The conductor and engineer were agents of the corporation, clothed with the control and management of a distinct department of the business of the company. They had, on this occasion, the entire control and management of the train, and were to all intents and purposes the personal representatives of the company, for whose negligence it is and ought to be responsible to the defendant in error, and other subordinates similarly employed. On page 394, the court, in *Chicago, M. & St. P. R. Co. v. Ross*, used this language: 'The conductor of a railway train who commands its movements, directs when it shall start, at what station it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company; and therefore that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner.' *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377; s. c., 17 Am. & Eng. R. Cas. 501. The case, then, stands the same as it would if the president of the company or the board of directors were on the train, commanding and directing its movements, and committing the acts of gross negligence here imputed to the conductor and engineer. No one questions that, where the master himself is guilty of negligence resulting in an injury to one of his servants, the master is responsible for such injury. An attempt has been made here to distinguish the case at bar from *Chicago, M. & St. P. R. Co. v. Ross* by the circumstances that in the latter case the injury was caused by the conductor of the train on which the injured person was employed at the time, whereas in the case at bar the person whose negligence caused the injury was conductor of another train, and not of the train on which the injured person was riding. We can see no difference in principle between the cases. In each case the party guilty of negligence stood as vice-principal. He represented the company, he was engaged in a totally different department of labor from that in which defendant in error was employed, and he stood in a very different relation to their common principal. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; s. c., 24 Am. & Eng. R. Cas. 407; *Cunard Steamship Co. v. Carey*, 119 U. S. 245."

A Telegraph Operator and a Brakeman are not fellow-servants. *Hall v. Galveston, H. & S. A. R. Co.*, 39 Fed. Rep. 18.

ST. LOUIS, ARKANSAS AND TEXAS R. CO.

v.

WELCH.

(*Texas Supreme Court*, December 14, 1888.)

Fellow-servants—Train Hands—Foreman of Bridge Gang.—Employees engaged in operating a train, are fellow-servants of the foreman of a bridge gang in the sense that it precludes the latter from a recovery of the company for injuries inflicted by reason of their negligence.

Same—When Servant is "on Duty,"—The foreman of a bridge gang is deemed to be "on duty," although at the time of the accident he was

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asleep in a car provided by the railroad company for that purpose, which was placed upon a side track, if he was liable to be called upon, at any moment, to go out with his gang on duty upon the road.

APPEAL from District Court, Smith County.

Action against the St. Louis, Arkansas & Texas R. Co. to recover damages for personal injuries sustained by the plaintiff, L. Welch. A judgment was rendered for the plaintiff from which the defendant appeals.

N. Webb Finley for appellant.

John M. Duncan for appellee.

GAINES, J.—This was an action for personal injuries, brought by appellee against appellant. The case made by the plaintiff showed the following facts: The plaintiff was the foreman of a bridge gang in the employment of the defendant company, engaged in putting in and repairing bridges along the line of its road. About 3 o'clock in the morning, on the day of the accident, he was asleep in the bunk of a sleeping-car provided by the company for the purpose, which was lying on a side track of the railway in the town of Gilmer. At the time mentioned the employees of the defendant operating a freight train on its road negligently ran the train rapidly upon the side track, and struck the car upon which he was sleeping with such violence that he was thrown from his bunk, and seriously injured. He and the employees who caused the injury were engaged in different departments of the company's road. His employment was in the bridge department, and he received his instructions from the superintendent or management of that department, while the employees on the train were working in the transportation department, and were under the orders of its superintendent. It appears from the testimony that the plaintiff was subject to the orders of the company to go out on duty at any time. Without referring to the assignments of error, it is sufficient to say here that the two questions presented by the record are whether the plaintiff and the employees of the train are to be deemed fellow-servants, in the sense that precludes him from a recovery of the company for injuries inflicted by reason of their negligence; and, if so, whether he is to be considered as on duty at the time of the accident.

Upon the question, who are to be held "fellow-servants," in the legal sense of that term, there is great contrariety of judicial opinion. The doctrine that one fellow-servant cannot recover of the master for injuries inflicted through the negligence of his fellow-servant is of comparatively recent origin. It was first announced in 1837, in the English court of exchequer, in the case of *Priestly v. Fowler*, 3 Mees. & W. 1. The supreme court of South Carolina

Fellow-servants—Review of authorities.

laid down the same rule in the case of *Murray v. South Carolina R. Co.*, 1 McM. (S. Car.) 385. This case was decided in 1841, and is the first case in which the rule was applied in this country. The opinion shows that the court were unaware of the decision in *Priestly v. Fowler*, *supra*. In 1842 the subject was very carefully considered by the supreme court of Massachusetts in the case of *Farwell v. Boston & W. R. Co.*, 4 Metc. (Mass.) 49, and the same doctrine was announced. This has become the leading case, and has been rigidly followed by the courts of England and by a majority of the courts in this country. The question of persons employed in different departments of the same general business of the common master was considered in that case, and in discussing it Chief Justice Shaw, who delivered the opinion, uses this language: "It was strongly pressed in argument that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security, yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree influence or control the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and when the several persons employed derive their authority and compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty."

The language employed in the last sentence quoted has been generally used by courts and text writers as the basis of the definition of the term "fellow-servants." Substantially the same language has been frequently employed by our own courts in defining the term. *Houston & T. C. R. Co. v. Rider*, 62 Tex. 267; *Texas & P. R. Co. v. Harrington*, Id. 597; s. c., 21 Am. & Eng. R. Cas. 571; *Missouri Pac. R. Co. v. Watts*, 63 Tex. 549.

The rule so announced in *Farwell's Case* has, as previously intimated, been followed closely in the courts of England, and generally in the American courts, in its broadest application. Latterly there has been shown some disposition to modify the doctrine, but it has mainly been in the direction of making a distinction between servants of a different grade. The case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377; s. c., 17 Am. & Eng. R. Cas. 501, is a case of this latter character. As to service in different departments of the same common employment, there is less conflict of authority. In the courts of a few of the states it has been held that the employees in different branches of the same general employment are not fellow-ser-

vants. This is the rule in Illinois (*Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 576; s. c., 17 Am. & Eng. R. Cas. 564); in Tennessee (Nashville, etc., R. Co. v. Jones, 9 Heisk. 27); in Kentucky (Louisville, C. & L. R. Co. v. Cavens, 9 Bush (Ky.), 559); in Georgia (*Cooper v. Mullins*, 30 Ga. 150); and perhaps in Virginia (*Moon v. Richmond & A. R. Co.*, 78 Va. 745; s. c., 17 Am. & Eng. R. Cas. 531). This was the ruling in Indiana in the earlier decisions (*Gillenwater v. Madison & I. R. Co.*, 5 Ind. 339; *Fitzpatrick v. New Albany & I. R. Co.*, 7 Ind. 436); but these cases have since been overruled (*Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174). Judge Thompson, in his work on Negligence, lays this down as the "exceptional" doctrine. 2 Thomp. Neg. 1026. Our researches have satisfied us that this is correct, and that the great weight of authority is the other way. The cases are too numerous for citation, but see Thomp. Neg. *supra*; Shear. & R. Neg. §§ 108, 109; Whart. Neg. § 230; Wood, Mast. & Serv. § 425. See also Patt. Ry. Accident Law, §§ 324, 325, where the cases are grouped.

In reference to these citations, the caution is to be observed that in many of the cases in which certain employees were not

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held fellow-servants it was upon the ground that the one was subject to the control of the other. In considering this question, there is danger of a mistake growing out of that class of cases which hold a railroad company liable to its servants operating its trains for injuries resulting from negligence in the keeping of the track. In deciding these cases, the courts sometimes say that the train-men and the track-repairers are not fellow-servants; and it is pretty generally held that in these cases the person charged with the duty of keeping up the track is the representative of the company, and not a servant only. But the true rule, as we take it, is that it is the implied obligation and duty of the company to its employees to furnish a safe track. But in the present case, if we should hold that the plaintiff, as to repairing bridges, etc., was the representative of the company, and that the servants in the transportation department could recover for injuries resulting from his neglect, it would not follow that he could recover for their negligence. A servant may be a representative of the company in one relation; a fellow-servant with co-employees in another. *Crispin v. Babbitt*, 81 N. Y. 516.

Recurring to our own decisions, we think it has been decided in the case of *Dallas v. Gulf C. & S. F. R. Co.*, 61 Tex. 196, 21 Am. & Eng. R. Cas. 575, that service in different departments of duty does not exempt an employee of a railroad company from the operation of the general rule. There the railroad company was engaged in constructing an extension of its line. The plaintiff had been

Servants employed in different departments.

employed in watching the ties along the line, but had undertaken for the company to procure and record a deed, and in the discharge of this duty took passage upon the construction train, when he was injured by the negligence of the employees who were operating the train. He was held not entitled to recover. We understand the decision to be placed upon the broad ground that the fact that plaintiff, though engaged in a different line of duty from the employees who were running the train, was their fellow-servant. We confess that the reasoning upon which the rule has been adopted is not very satisfactory. It is said that when the servant accepts the employment of the master he impliedly assumes the risk of the negligence of his fellow-servants. The argument seems illogical. It amounts to saying that the law is that he cannot recover because he takes the risk, and that he takes the risk because the law is so. By a parity of reasoning, we might assume that he takes the risk of his master's own personal negligence, and that, therefore, the master would not be liable to a servant for such negligence. A more reasonable ground is that of public policy. It is frequently asserted as the true basis of the doctrine, and is founded upon the theory that it is calculated to make servants in a common employment watchful of each other, and thereby to promote carefulness in the performance of their duties. If this is to be taken as the true ground, the rule should be confined to those servants whose duties bring them into such juxtaposition that one would be enabled to observe the negligence of his fellows. But, however unsatisfactory may be the reasons for the doctrine, it is too well established, and its limits, in so far as the question before us is concerned, are too well defined, to permit us to intrench upon it. We feel constrained, both by the former opinions of this court and the great weight of authority elsewhere, to hold that the employees who were operating the train which caused the injury in this case were the fellow-servants of the plaintiff. If we could hold it an open question, our ruling might be otherwise: but we consider the doctrine too firmly established to be changed, except by the action of the legislature.

The other proposition in this case requires no extended discussion. The plaintiff at the time of the accident was asleep on a car belonging to the company, provided by it for that purpose, which was placed upon its side track. He was liable to be called upon at any moment to go out with his gang upon duty upon the road. We think he must be held to have been upon duty at the time he received the injury. That the accident occurred when he was resting from his labors, we think makes no difference. He was subject to the call of the company at the time, and his case differs from that of other servants who engage for certain hours of employment,

When servants
to be deemed
"on duty."

and who are injured during the intervals in which the master has no claim upon his services. We think the court should have instructed the jury that if plaintiff was foreman of the bridge gang, and was injured by the negligence of the employees operating a train on the road, he was the fellow-servant of such employees; and also that if at the time of the accident he was asleep upon a car provided for the purpose by the company, and under his contract was subject to be called out for duty at any moment, he was on duty.

The assignment that the court erred in overruling the motion for a new trial, on the ground that the evidence is not supported by the verdict, sets out fully the particulars in which the evidence fails to support the verdict, and is well taken.

The judgment will accordingly be reversed, and the cause remanded.

Fellow-servants—Track Hands Injured through Negligence of Train Hands.

—A track repairer injured through the negligence of train hands in failing to light the head-light of the locomotive is not entitled to recover according to the supreme court of Minnesota. The "negligent omission," say the court, "to provide a head-light (or lantern) upon the locomotive,—it appearing that a head-light is necessary to the safe running of a train in the dark,—would have been the negligence of the defendant, as between it and its servants, for which it would have been liable to them for injuries caused by it. *Drymala v. Thompson*, 26 Minn. 40. There was, however, no evidence that there was not a head-light on the locomotive; on the contrary, the evidence was full and satisfactory that it had a head-light. There was evidence enough that it was not lighted at the time. That was due to the neglect of those in charge of the train,—fellow-servants of Collins,—for whose negligence the defendant would not be liable to him or his representatives. *Foster v. Minn. Cent. R. Co.*, 14 Minn. 360." *Collins v. St. Paul & S. C. R. Co.*, 30 Minn. 31; s. c., 8 Am. & Eng. R. Cas. 150. In *Pennsylvania R. Co. v. Wachter*, 60 Md. 395; s. c., 15 Am. & Eng. R. Cas. 187, also, it was held that where through the fault of persons in charge of the train the head-light is not exposed in front of the engine in foggy weather, as expressly required by a rule of the company, the company is not responsible for the negligence of such persons, unless it failed to exercise proper care in their selection, or retained them in their service with knowledge of their incompetency.

If the employees running a train fail to observe due diligence and run over a track hand, he has no remedy against the company, being a fellow-servant of such train hands. *Blake v. Maine Cent. R. Co.*, 70 Me. 60; s. c., 35 Amer. Rep. 297; *Gormley v. Ohio & M. R. Co.*, 72 Ind. 31, and see *Corbett v. St. Louis, etc., R. Co.*, 26 Mo. App. 621; *contra*, *Chicago & A. R. Co. v. Kelly* (Ill., 1889), 21 N. E. Rep. 203. In *Easton v. Houston, etc., R. Co.*, 32 Fed. Rep. 893, a section-hand was returning to the section-house on a hand-car which was run into by a train and he was injured. It was held that, as at the time of the injury he was running a car on the train, and was brought into direct relations with the employees running the train, they were fellow-servants. See also *Hutchinson v. York, N. & B. R. Co.*, 5 Ex. 343; 19 L. J. Ex. 296.

ANDERSON

v.

BENNETT.

(Oregon Supreme Court, November 5, 1888.)

Fellow-servant—Assumption of Risk—Common Employment.—The general doctrine that a master is not liable for injuries caused by the negligence of a fellow-servant in the same common employment is now regarded as settled law. The reason assigned for this exemption is that, by his contract of employment, the servant assumes the risks incident to it, and that both he and his employer had them in contemplation in fixing the compensation.

Same—Vice-principal—Foreman or Superior Servants.—A marked change from the old rule is taking place in the law as to servants clothed with partial authority only, such as a foreman or superior servants, and the principle upon which such change is based is that when a master delegates any duty which he owes to his servants, he is liable for its proper performance.

Same—Criterion of Liability—Vice-principal.—Guided by this principle, several tests have been applied in determining the line of demarcation between the representative of the master and the mere servant, and among them is the ruling that the master is chargeable for any act of negligence in so far as the servant is charged with the performance of the master's duty to his servants, such as the selection of competent servants, the furnishing of suitable tools and instrumentalities, the providing of a reasonably safe place in which to work, and the observance of such care as will not expose the servant to hazards and perils which may be guarded against by proper diligence, etc.; and to the extent of the discharge of these duties which the master owes to his servant by the middle man or vice-principal, the latter stands in the place of the master.

Same—Safety of Premises—Machinery and Appliances.—It is therefore a duty which the master owes to every servant to provide a reasonably safe place at which to work, having reference to the nature of the undertaking, or the exigency of the situation, and although he is not an insurer he is bound on the same principle by the law to exercise due and proper care in this regard as he is in hiring competent servants, or in supplying reasonably safe machinery or other appliances for the use of his servants.

Same—Devolution of Duty.—As the defendant was not personally present and did not promulgate or establish any suitable or needful rules and regulations for the safe and proper conduct of the work, and as the direct management or execution of the work during his turn was placed in charge of C., there necessarily devolved upon him the duties in this particular which the defendant owed to his servants; and as a consequence it became the duty of C. to provide for the safety of the servants under his control and subject to his commands, by the exercise of such care in the management and conduct of the undertaking intrusted to him as would render reasonably safe the place at which the employees must apply the machinery and do their work.

Same—Vice-principal—Providing Safe Place for Work.—C. was thus not only the foreman to direct the work of the hands under him, but the person above all others to provide that they should have a reasonably safe place at which to work, consistent with the exigencies of the situation; and in this view it is of no importance by what name C. be called, whether a middle-man, superintendent, or foreman.

Same—Negligence—Evidence—Drilling and Blasting.—When therefore C. ordered the plaintiff to set up the machinery, and drill holes at the place where the injury occurred, without having taken any care, or at least adopted some precautionary measures to discover whether there were holes charged with giant powder which had failed to explode, and to guard against the danger of the drills penetrating them, etc., he committed a negligent or wrongful act, and exposed the plaintiff to a serious danger not contemplated by his contract of service.

APPEAL from Circuit Court, Multnomah County.

Action by August Anderson against Nelson Bennett for damages for personal injuries. Defendant appeals from a judgment for the plaintiff.

H. Y. Thompson and *Geo. H. Williams* for appellant.

Geo. W. Yocum and *F. Clarno* for appellee.

LORD, J.—This is an action to recover damages for personal injuries caused by the alleged negligence of the defendant, his servants and agents. The complaint, in effect, is that the defendant was engaged in constructing the tunnel on the line of the Northern Pacific R. Co., and that the plaintiff was engaged in his service for hire as a common laborer during the time therein mentioned; that Thomas Cosgrove was the foreman, manager, and superintendent of said work, and that plaintiff was directly under his control and authority, and that by reason of his negligence he was greatly injured and his eye-sight destroyed. The substance of the evidence is that the defendant was a contractor for the construction of a tunnel for the Northern Pac. R. Co., and that S. J. Bennett was his chief superintendent and M. B. Turner was his assistant at the west end of the tunnel, where the plaintiff was engaged at work, and that Cosgrove was the foreman of the gang or shift of men to which the plaintiff belonged; that in the prosecution of this work there were two shifts or gangs of men, working alternately by day and night; that in performing this work they would clear up so much of the broken rock and *debris* as would make a clean place for them to operate their drills, which bored holes, horizontally and perpendicularly, in the benches of the tunnel, then charge them with giant powder and explode it, when that gang or shift would retire to be succeeded by the other, who would go through, in their turn, a like routine of labor; that the materials and appliances for doing the work were furnished by Bennett, the superintendent; that Cosgrove was a man of skill and experience in the business of tunneling,

Facts.

and that in the management of the work of blasting, during his turn, he acted upon his own judgment, directed and controlled the use of the explosives as well as the use and location of the machinery and drills, commanded the movements of the men under his control, and ordered them when and where and what to do, and how to do it; that he had hired and discharged men under his control, although his authority to do so was denied and contradicted, but not the fact that he had done so; that on the day of the accident the plaintiff was ordered by Cosgrove to drill a perpendicular hole in a certain rock in the tunnel, and that Cosgrove placed the drill on the spot, and ordered and directed the plaintiff to drill the hole, which he was engaged in doing when the explosion occurred that caused the injury; that the injury was occasioned by his boring into a missed or unexploded hole which was not discoverable by reason of the neglect of the foreman to remove the *debris* and broken rock. In respect to this point one witness testified "that until a good deal of work in cleaning up had been done, that it was impossible for any one to tell whether there was any missed or unexploded holes; that they did not work long in cleaning up before they started drilling; that the missed hole which exploded and done the injury to the plaintiff was covered up with loose rock, and no one could see whether there were any missed holes or not." And again: "There was no chance to examine for missed holes until the rock was cleaned off. Nobody could tell there was any missed holes, because there was so much rock and *debris*." And when the inquiry was made why it was not cleared off so as to find out whether there were any missed or unexploded holes, the witness answered: "Because we did not have time. The foreman would not give us time; he was pushing us ahead all the time,—hurrying us up." This evidence, in substance, is fully corroborated by others. It is further testified to that "the first thing we did when we got in was to clean off the benches, and get ready for drilling;" that before putting the drills to boring it was necessary to have a clean place, and as soon as this was done the drilling began. As to the condition of the tunnel, Cosgrove testifies when he went in that "he looked the tunnel over to see if it was safe: supposed it was safe; that the lower part you could not tell anything about it, as it was all covered with rock." He further testified that there was a rule for the men to look after missed holes, and to report them to him; and the evidence shows that the plaintiff complied with this regulation. In this particular it may be well to note what he testifies: "When I was drilling the first hole, I discovered an unexploded hole, and called the foreman's attention to it. This hole I discovered was about ten or twelve inches from the hole I was drilling, maybe a little one side. I asked the foreman if he

thought there was any danger for me to work in that place. He told me there was no danger; 'go ahead and work.' When the hole was finished I called the foreman's attention again, and asked him in what place he wanted me to drill the next hole, and the foreman took hold of the drill with his hand and set the hole in a perpendicular place and ordered me to drill. This was from four to five feet from the hole I had just drilled. I was drilling a perpendicular hole. When I had drilled only a short time in that place, the explosion happened." And he testifies that "the reason of the explosion was that there was a hole that failed to explode underneath the hole that the foreman had ordered me to drill, and as soon as a part of the drill struck the powder it exploded. That explosion destroyed my eye-sight." The evidence also shows that the men were put to work cleaning away the *debris* in the first instance only for the purpose of getting a clean place so as to operate the drills, and that when this was accomplished the drills were set going; that with the exception of the rule already referred to there was no other rule or regulation or instructions devised to protect or provide for the safety of the men in the course of their employment, or requiring the broken rock and loose dirt to be cleaned off so as to discover and expose the unexploded holes before the process of drilling began. Some idea of the force of the explosion, and the danger arising from unexploded holes, unless proper precautions are taken to discover them, is shown by the evidence, when it resulted in the killing of four men outright, and seriously wounding and maiming some six or seven others of the gang.

Upon substantially this state of facts the court, after giving the usual preliminary instructions to guide the jury in weighing the evidence, etc., charged them that "it was a settled rule of law that a master was not liable to his servant for injuries caused by the negligence of a fellow-servant, and if they found Cosgrove was such, their verdict must be for the defendant; that the term 'fellow-servant,' as a general rule, includes all who serve the same master, work under the same control, and derive compensation and authority from the same source, and are engaged in the same general employment, etc.; that where a master submits the substantial control of the business, or a particular department thereof, to another, giving to such party the power to select his associates and to discharge them, and full authority to command the laborers over whom he is placed, and direct when and where and how they shall work, the party so invested with authority, although himself a servant, is not a fellow-servant of the laborers thus placed under his control, but that such party stands in the relation of vice-principal, and the master is answerable for his negligence." Then, directing his instructions more particularly to the facts of the case in

hand, said: "If the jury find from the evidence in this case that Cosgrove was at the time of the explosion described in the complaint, charged and intrusted by the defendant with the control and management of the blasting and the using of high explosives in the Cascades tunnel, and had authority to choose and discharge the men employed in the work, and to command and direct when, where, and how the men should work, and that in pursuance of such charge and trust Cosgrove was exercising authority over the plaintiff as one of the employees of the defendant, so that he could and did rightfully order and direct the plaintiff when, how, and where he should work, and with what tools and appliances he should work, then Cosgrove is not to be deemed a fellow-servant of the plaintiff, but in respect to this business he should be deemed as in place of the master, and Cosgrove's negligence, if he was negligent, should be deemed the negligence of the defendant. If, on the other hand, the jury find from the evidence that Cosgrove's position and authority at the time of the explosion were those simply of a foreman of a gang or shift of men, having only authority in the direction of the work of such gang or shift, then he is a fellow-servant with the plaintiff, and the defendant is not liable." It is sufficient to say that the trial resulted in a verdict and judgment for the plaintiff, from which the defendant has brought this appeal.

The contention of counsel in this case may be thus summarized: Unless Cosgrove was the fellow-servant of the other servants under his direction and control, or the instruction last referred to incorrectly defines a vice-principal or representative of the master as applicable to the facts, there is no error in the record, and we must affirm this judgment.

The general doctrine that a master is not liable for the injuries caused by the negligence of a fellow-servant engaged in the same common employment is now regarded as part of the common law of this land. The reason commonly assigned for this exemption is that by his contract of employment, the servant assumes the risks incident to it, and that both he and his master had them in contemplation in fixing the compensation. Hence it is said: "He cannot in reason complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid." *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 383, 17 Am. & Eng. R. Cas. 501. But what are the natural and ordinary risks incident to his employment, and which are supposed to have been adjusted in the stipulated compensation? and who, within the principle of the rule, are to be deemed fellow-servants engaged in a common employment? are questions often difficult to determine, and in respect to which the adjudged

Fellow-servants—General doctrine.

cases are so conflicting that it is impossible to reconcile them. Each case in a great measure seems to be determined by the peculiar circumstances which surround it.

Although *Murray v. South Carolina R. Co.*, 1 McM. (S. Car.) 385, was decided prior to *Farwell v. Boston & W. R. Co.*, 4 Metc. (Mass.) 49, yet the latter has been usually regarded as the leading case in which the doctrine of fellow-servants was first clearly enunciated, and its principles ingrafted into our law. The rule, as there stated by the eminent judge who delivered

**Authorities
reviewed.**

the opinion, is to the effect that all servants of the same master whose labors tend to the accomplishment of the same general purpose, and engaged in a common employment, are fellow-servants, irrespective of their relative grade or rank. The rule as thus declared was generally accepted by the courts of the country as a correct exposition of the law, and it has been approved and adopted by the highest court in England. Within the principle of that rule, all servants, no matter what position they occupied towards each other, or how different and separated the departments of duty in which they were employed, whether operating a mine or factory, or railway, were deemed to be fellow-servants. In *Albro v. Agawam Canal Co.*, 6 Cush. (Mass.) 75, the court held that a superintendent to whom the master had intrusted the entire charge of a factory, with the authority to hire and discharge the operatives, was a fellow-servant with one of such operatives. This view has been stoutly adhered to in Massachusetts ever since (*Holden v. Fitchburg R. Co.*, 129 Mass. 268; s. c., 2 Am. & Eng. R. Cas. 94); and perhaps is still maintained in Pennsylvania (*Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 438). It seems to ignore the generally accepted idea of vice-principalship as it prevails in some of the other states, and treats all servants under the same control, who serve the same master, as fellow-servants, notwithstanding one may stand in the master's place in relation to the other. And in Great Britain, until abrogated by the employer's liability act, the same principle was the settled law as declared by the highest judicial tribunal in that kingdom. *Wilson v. Merry*, L. R. 1 H. L. 326. This is specifically stated by Lord Blackburn in his comments upon that case, in which he said: "But the decision of the house of lords is distinct, at least so far as this: that the fact that the servant held the position of vice-principal does not affect the non-liability of the master for his negligence as regards a fellow-servant." *Howells v. Landore Steel Co.*, L. R. 10 Q. B. 62.

But in the progress of society since the decision in *Farwell v. Boston & W. R. Co.*, *supra*, such as has been the increase in the numbers and magnitude of the business operations of the country, the great army of servants required to be employed to per-

form their work, and the necessity of placing over them, and in charge of these vast operations, other servants to direct and control their labor, that there has been wrought in the judicial mind the conviction that the general application of that rule in such cases has often worked manifest injustice and hardship; so that the later current of judicial decision, and, it may be added, by legislative action, indicates a marked departure from that rule, and a disposition to so limit and restrict it as shall make the master answerable for his just share of responsibility to his servant for injuries sustained in his employment. And although it may be said that the weight of adjudged cases is that the relative grade or rank of the servant does not alter the relation of fellow-servants, yet this principle has not always commanded universal recognition, but it has been criticized and denied, and a contrary view asserted by the courts of several of the states, and at least materially limited, if not recognized and adopted, by the supreme court of the United States. In *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201, the court say: "No service is common that does not admit a common participation, and no servants are fellow-servants when one is placed in control over another." In *Darrigan v. New York & N. E. R. Co.*, 52 Conn. 285, *Carpenter, J.*, said: "To make no discrimination, but in all cases to place those invested with authority to direct and control on the same footing with those whose duty it is merely to perform as directed, without discretion and without responsibility, seems to us unwise and impolitic." *Railroad Co. v. Bowler*, 9 Heisk. (Tenn.) 866; *Cowles v. Richmond, etc., R. Co.*, 84 N. C. 309; s. c., 2 Am. & Eng. R. Cas. 90; *Moon v. Richmond & A. R. Co.*, 78 Va. 745; s. c., 17 Am. & Eng. R. Cas. 531; *Chicago & A. R. Co. v. May*, 108 Ill. 288; s. c., 15 Am. & Eng. R. Cas. 320; *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb. 261; *Louisville and N. R. Co. v. Collins*, 2 Duv. (Ky.) 114; *Criswell v. Pittsburgh, C., & St. L. R. Co.*, 30 W. Va. 798, 33 Am. & Eng. R. Cas. 232; 1 Redf. R. R. 529n, in which the learned author says: "We would be content to treat all subordinates who are under the control of a superior as entitled to hold such superior as representing the master. In *Chicago, M., & St. P. R. Co. v. Ross*, 112 U. S. 377; s. c., 17 Am. & Eng. R. Cas. 501, the court below had ruled in effect that in the operation of a train the relation of superior and inferior was created between the conductor and engineer, and therefore, within the reason of the rule, they are not fellow-servants; and in affirming this ruling Mr. Justice Field said: "There is, in our opinion, a clear distinction to be made in their relation to their common principle between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the

corporation clothed with the control and management of a distinct department, in which their duty is entirely that of supervision and direction. A conductor having the entire charge or management of a railway train occupies a very different position from the brakeman, the porters, and other subordinates employed. He is, in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. . . . The conductor of a railroad train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner." These and other references might be made to show the extent to which the rule has been relaxed and modified in several of the States, as well as the dispute which exists as to the proper limitations.

Nor can there be any doubt but that a decided change is taking place from the old rule as to servants clothed with partial authority only, such as a foreman or upper servant, which considered such as fellow-servants with those under their control and subject to their orders, and for whose negligent acts the master was not liable. A principle upon which a change in the law is based is that, when the master delegates any duty which he owes to his servants, he is liable for its proper performance. One way of applying it in determining the line of demarcation between the middle-man or mere servant is to ascertain whether the master has conferred on the foreman or superior servant the authority to employ and discharge the servants under his control. By some courts this seems to be regarded as a decisive test, while others consider it only as an element, although an important one, in determining that question. Another way is by considering the master liable if the negligent servant is in charge of or vested with the discretion to control and manage a branch or department of the master's business. But this must be understood to mean something more than the mere right to oversee hands or direct their labors, something more than higher wages or general superiority in position or in skill or intelligence. Another way of testing is by holding that it is a personal or absolute obligation or duty which the master owes the servant to provide proper instrumentalities, etc., for the conduct of his business; and, if he intrusts this duty to his servant, instead of discharging it himself, such servant is not a fellow-servant within the meaning of the rule of liability for negligence, and the master is liable for its perform-

**Rule as to vic-
principals.**

ance. In *Shear. & R. Neg.* § 102, the law is thus stated : "One to whom an employer commits the entire charge of the business, with power to choose his own assistants, and to control and discharge them as freely and fully as the principal could himself, is not a fellow-servant with those employed under him, and the master is answerable to all under-servants for his negligence, either in his personal conduct within the scope of his employment or in his selection of servants." Mr. Beach thinks the better rule, and the one more consonant with justice and right reason, has been well stated by McIver, J., in *Gunter v. Graniteville Manufacturing Co.*, 18 S. C. 262, in this language : "The test as to whether an employee is the representative of the master is not whether such employee has power to employ and discharge hands, or to purchase or change machinery ; for, while these are some of the duties of the master, they are not all of his duties, and hence an employee who is not intrusted with either of these powers may still be the representative of the master. The true test is whether the person in question is employed to do any of the duties of the master. If so, he cannot be regarded as a fellow-servant, but is the representative of the master, and any negligence on his part in the performance of the duty thus delegated to him must be regarded as the negligence of the master." *Beach, Contrib. Neg.* §§ 110, 115. "When the master," says Mr. Wood, "delegates complete control over the business, or over any department thereof, to another, the person standing in his place is not regarded as a fellow-servant, but rather as a vice-principal. In such case the person to whom such power is delegated stands in the place of and represents the master, and all acts or omissions in respect to the matters in which he acts in the place of the master in performing the master's duty to the servant are the acts or omissions of the master himself." *Wood, Mast. & Serv.* § 436. And he further says : "The rule established and supported by the better class of cases is that, whenever the master delegates to another the performance of a duty to his servant, which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middle-man whom he has selected as his agent ; and to the extent of the discharge of those duties of the middle-man he stands in the place of the master, but as to all other matters he is a mere co-servant." *Id.* § 438, and note 3.

It is thus seen, whatever diversity of opinion exists in the judicial mind as to the proper qualifications or limitations of the rule, the cases agree that the master is under no personal obligation to give his personal superintendence to the execution of the work, but that he may delegate that power, or any of the duties, to a superintendent or foreman. The question

Foreman.

which most frequently arises, and often the most difficult of solution, is in respect to a foreman, and the relation in which, upon the facts, he stands to the other servants. It is no doubt true, as Mr. Thompson says, that a mere foreman of work is generally regarded as a fellow-servant under the rule, but if the master has delegated to him or to a superintendent the control and management of the business or some department thereof, then the rule may be different. And he says: "A true expression of the rule seems to be that in order to charge the master the superior servant must so far stand in the place of the master as to be charged with the duties toward the inferior servant, which, under the law, the master owes to such servant." 2 Thomp. Neg. 1031. A foreman ordinarily works hand to hand with his co-servants, and does not have the entire charge and control of the business, or any division thereof. He does not act upon his own judgment, but is generally subject to the orders and control of a superintendent. His duties do not exceed mere direction of his co-servants, and do not include the power to hire or discharge hands, or the performance of duties which belong to the master himself. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Brick v. Rochester, N. Y. & P. R. Co.*, 98 N. Y. 211; s. c., 21 Am. & Eng. R. Cas. 605; *Doughty v. Penobscot Log Driving Co.*, 76 Me. 143; *State v. Malster*, 57 Md. 287.

Now, the main contention of counsel for the defendant is that Cosgrove was a fellow-servant with those under his control, and **Was plaintiff's foreman his fellow-servant?** not a vice-principal, whom, he argues, to create, the master must have committed to him the entire charge of the business, with full powers to select servants and discharge them, purchase materials and appliances, and do all things as fully and freely as he could himself in the management of the business. On the other hand, the contention of counsel for the plaintiff is that the master had committed to Cosgrove a distinct portion of the work, and devolved upon him the control and management of it, and the method of its execution, with power to direct the men, and enforce obedience to his orders in the prosecution of their work, which involved the performance of some duties that the master owes to the servant, and which, if he intrusts or delegates them to another, he is answerable for the manner in which they are discharged. Tested by the rule as laid down by some text writers, and sustained by a number of respectable authorities, Cosgrove was a fellow-servant, and not a representative, of the master. He did not have delegated to him the entire charge of the business, or any department thereof, so exclusive in its character that the master deprived himself of all authority or supervision in respect to it. Under that rule, although Cosgrove might be charged with the performance of some duty which the master

owes to his servant, yet, if he has not delegated to him all the master's powers and duties, surrendered to him the exclusive control and management of the enterprise or business, without reserving to himself any discretion or authority in the matter, he would be regarded as a servant in a common employment with those under him, and therefore a fellow-servant. "The true rule is," said Church, C.J., "to hold the master liable for negligence or want of proper care in respect to such duties as he is required to perform and discharge as master and principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the master, and the latter should be deemed present, and consequently liable for the manner in which they are performed." *Flike v. Boston & A. R. Co.*, 53 N. Y. 553. The same principle was again declared in *Fuller v. Jewett*, 80 N. Y. 46; s. c., 1 Am. & Eng. R. Cas. 109, in which it was held that an act or duty, which the master as such is bound to perform for the safety and protection of his employees, cannot be delegated, so as to relieve him from liability to a servant injured by its omission or its negligent performance, whether the nonfeasance or misfeasance be that of a superior or inferior officer, agent, or servant to whom the doing of the act or the performance of the duty has been committed. "In either case, in respect to such act or duty," said the court, "the servant who undertakes or omits to perform it is the representative of the master, and not a mere co-servant with the one who sustains the injury."

The conclusion to be deduced from these and other authorities to which reference might be made is that the master is chargeable for any act of negligence in so far as such servant is charged with the performance of the master's duty to his servants,—such as the selection of competent servants, the furnishing of suitable tools and appliances, the providing of a reasonably safe place in which to work, and the observance of such care as will not expose the servant to hazards and perils which may be guarded against by proper diligence, etc.; and to the extent of the discharge of these duties which the master owes to his servants by the middle-man or vice-principal, the latter stands in the place of the master. In this place there is no complaint that the defendant as master did not select competent servants, or that he retained incompetent ones, nor failure to supply suitable instrumentalities with which to do the work; but the grievance of which the plaintiff complains is that he failed and neglected, or that his agent Cosgrove, to whom he committed the execution of the work, failed, to take such precautionary measures for the safety of his servants as he owed to them, and was in duty bound to observe, so as to provide for their safety, and to provide for

Performance
of master's
duty to his
employees.

them a place, as reasonably safe as was consistent with the nature of the undertaking, in which to labor and attend the drills.

It is the duty which the master owes to every servant to provide a reasonably safe place in which to work; and, although he is not an insurer, he is bound on the same principle by the law to exercise due and proper care in this regard, as he is in hiring competent servants, or in supplying reasonably safe machinery or other instrumentalities for the use of his servants. This is regarded as a personal or absolute obligation; and if the discharge of this obligation is intrusted to a servant, such servant is the representative of the master, and any negligence on his part is the negligence of the master. The servant has a right to rely on the master's performance of this duty, and his omission to take due care in this respect, whereby injury results to his servant, will be included among the risks which he assumes, and for which he is liable. And while he is not an insurer on their safety, he is not at liberty to neglect all care; he must use due and reasonable care, according to the exigencies of the undertaking. The obligation not to expose the servant to perils which by proper diligence may be guarded against, becomes more important, and the degree of diligence and care to be exercised in its performance the greater, in proportion to the dangers which may be encountered. *Hough v. Texas & P. R. Co.*, 100 U. S. 214; *Darrigan v. New York & N. E. R. Co.*, 52 Conn. 306. The duty, therefore, is affirmative and active, to take such or to adopt such precautionary measures as the proper and reasonably safe conduct of the business requires to avoid accident. Now, the evidence shows that the defendant intrusted the work of blasting and using dangerous explosives in charge of Cosgrove, and placed the men under his control, and subject to his orders for the execution of that work. In this respect he exercised supervision over the work, managed and controlled the use of the explosives, directed the place where the machinery and drills should be applied and used, and where and how the men should work. It appears that after an explosion in the work of blasting, the benches and floor of the tunnel would be covered with broken rock and debris, and that the work of the shift or gang of men that came on was to clean out the debris, drill holes, charge them with giant powder, and explode it, etc.; that, if any holes thus charged failed to explode, it was impossible to discover and locate them until such broken rock and debris had been removed, and that, if the drills with the force applied to them should penetrate any of such unexploded holes, it would cause an untimely explosion, and necessarily occasion great injury to the men, and probably a great loss of life.

Under these circumstances it was plainly a duty, and abso-

lutely essential to avoid exposing the men to unreasonable risks in the course of the work in which they were engaged, that so much of the rock should be cleaned away before the drilling began as would expose any missed or unexploded holes, or as would enable them to be discovered and located, so that the charge might be withdrawn, or other thing done to render them harmless, and the drilling and other work go on with comparative safety or no other danger than was incident to its precaution. The defendant was not personally present, nor did he promulgate or establish any suitable or needful rules or regulations for the safe and proper conduct of the work; and, as the direct management of the work, during his turn, was placed in charge of Cosgrove, there necessarily devolved upon him the duties in this particular which the defendant owed to his servants. It was therefore the plain duty of Cosgrove to provide for the safety of the servants under his control and subject to his commands, by the exercise of such care in the management and conduct of the business intrusted to him as would render reasonably safe the place in which the men must apply the machinery and do their work. There is nothing in the evidence to show that he took any such care, or took any such precautions as the nature of the business and his duty to the servants required. Instead of putting the men at work to clean up the debris and broken rock which covered the benches and floors of the tunnel for the purpose, first, of discovering and finding out whether there were any unexploded holes, and uncharging them, so that the place in which the men must work with the drills and do other work would be safe from penetrating a magazine in which lies stored and concealed a box of giant powder, he put them to work at cleaning up the debris only for the purpose of getting a clean place to operate the drills; and when this was accomplished, the drills were started at once, without regard to missed holes, or the dangers which lie buried under broken rock beneath their feet, but which would have necessarily been exposed by its removal. "Nobody could tell that there was any missed holes, because there was so much rock," and "We had no chance to examine for missed holes until the rock was taken off." "He did not give us time to clean up and see if there were any missed holes;" and so on, the evidence runs. Had the foreman, exercising only reasonable care and diligence, taken a precaution that it would seem the plainest dictate of humanity would require for the safety of the men in the work in which they were engaged, the missed hole must have been exposed, and this dreadful death-dealing explosion avoided. Cosgrove himself testifies that "he supposed it was safe; that there was a good deal of broken rock," etc.; but this has reference to when he

Duty of foreman not to expose subordinates to unnecessary risk.

entered the tunnel with his shift of hands, and when nothing had been done to clear away the debris. There is nothing in the evidence to show that he did anything then or afterwards which would make it, as he supposed it was, safe. It is the duty of the master not to expose the servant in performing his duties to hazards or perils which may be guarded against by proper diligence. *Hough v. Texas & P. R. Co.*, 100 U. S. 213. He is bound to observe that degree of care which prudence and the exigency of the situation or the nature of the work may require; to furnish reasonably safe instrumentalities or place in which to work, to avoid danger. "Though we have said," justly remarked Baron Alderson, "that a master is not generally responsible to a servant for an injury occasioned by a fellow-servant while they are acting in a common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servants to unreasonable risks." *Hutchinson v. York N. & E. R. Co.*, 5 Exch. 348. "It was held by this court," said Carpenter, J. (*Wilson v. Willimantic Linen Co.*, 50 Conn. 433), "that a master was bound to provide for his servant a reasonably safe place for his work, and reasonably safe appliances. An application of this principle to a railroad would require it to keep its road-bed, rolling-stock, and implements in a good and safe condition; to adopt rules and regulations adapted to its business, so as to guard against accidents. In short, all employers shall be vigilant in the use of means and the adoption of measures to make the servants in their employ . . . reasonably safe. To that extent the master assumes the risk." *Darrigan v. New York & N. E. R. Co.*, *supra*; *Baltimore & O. R. Co. v. McKenzie*, 81 Va. 73; s. c., 24 Am. & Eng. R. Cas. 395. "Indeed," said Mr. Justice Field, "no duty required for the safety and protection of his servants can be transferred, so as to exonerate him from such liability." *Northern Pac. R. Co. v. Herbert*, 116 U. S. 646; s. c., 24 Am. & Eng. R. Cas. 407. In *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kan. 633, the court say: "In all cases at common law a master assumes the duty toward his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work." And again, in *Hannibal & St. J. R. Co. v. Fox*, 31 Kan. 596, 15 Am. & Eng. R. Cas. 325, it is said: "One of the exceptions to the general rule at common law that the master is liable to one employee for the negligence of another employee in the same service, arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to hazards or perils against which he may be guarded by proper diligence on the part of the master. If it were otherwise, the master would be released from all obligation to make reparation

to an employee in a subordinate position for an injury caused by the wrongful conduct of the person placed over him, whether they were fellow-servants in the same common service or not." And finally, in *Fraker v. St. Paul, M. & M. R. Co.*, 32 Minn. 54, 15 Am. & Eng. R. Cas. 256, the court say: "It is the duty of the master to establish and promulgate suitable and needful regulations for the safe and proper conduct of its business, and there are duties which belong to the master as such, and in the performance of which he is bound to exercise such diligence for the protection of his employees; and if they are performed through an agent of whatever grade, he must be deemed to represent the master, and the latter is accordingly responsible for their negligent performance."

This is the language running all through the authorities upon this subject, and from these and others to which reference might be made, the principle is fully established that it is the duty of the master, or the person who represents him, to use reasonable care and diligence, and make reasonable provision for the servant's safety; and if he fails to do this he is responsible for the injury sustained as the result of his own or the agent's negligence, unless there was contributory negligence. It was therefore the duty of the defendant to make such needful rules for the conduct of the work, or take such precaution, as would provide for the safety of the men under the direction and control of Cosgrove,—as would not expose them to unreasonable risks or dangers in the performance of their duties. As a consequence, it was the duty of the defendant to protect them from the dangers of unexploded holes while engaged in their employment, as without such protection they would be constantly liable to imminent perils. As we have shown, if the reasonable precaution had been taken to remove the débris and broken rock, the unexploded hole which occasioned the injury must have been exposed and discovered, and the disastrous explosion avoided; but the defendant made no provision for these matters. In the execution of the work and the control of the men, he left everything to Cosgrove, and necessarily the adoption of such measures as would protect them while engaged in their work. He was thus not only the foreman to direct the work of the men under him, but the person above all others to provide that they should have a reasonably safe place at which to work, with reference to its risks and exigencies, and consequently it became his duty to be vigilant in the use of such means as would guard them from the dangers of unexploded holes. In this view it is of no importance by what name Cosgrove be called, whether middle-man, superintendent, or foreman. The truth is, as was said by the supreme court of North Carolina, in *Dobbin v. Richmond & D. R. Co.*, 81 N. C. 448,

that so variant were the relations between master and servants in different employments, and so close the line of demarcation between co-laborers and middle-men, that each case would have to stand upon its own facts. We think, therefore, when Cosgrove ordered the plaintiff to set up the machinery, and to drill holes at the place where the injury happened, without having taken some care, or at least taken some precautionary measures to discover whether there were holes which had failed to explode, and to guard against the dangers of the drills' penetrating them, he committed a wrongful and negligent act, and exposed the plaintiff to a serious danger not contemplated by his contract of service. In saying this we are not unmindful that the defendant is not an insurer, but we are mindful that he is not at liberty to neglect all care, but that he must use due and reasonable care. As a result we do not think Cosgrove was a fellow-servant, nor that there was error in the instruction.

The judgment must be affirmed.

Fellow-servants—Criterion for Determining when Employee or Agent becomes Vice-principal for whose Negligence Master is Liable.—The court, in the principal case, in adopting the criterion "When a master delegates any duty which he owes to his servant, he is liable for its proper performance," follows, although it does not cite, a large number of decisions in the courts of other states. The correctness of this criterion has been considered, and we think conclusively established, in a former note (see "The Criterion of Fellow-service," note by George W. Easley, 25 Am. & Eng. R. Cas. 513). It will be profitable here to examine the expressions of the different courts which have avowedly adopted this criterion.

Arkansas.—Eakin, J.: "Where a master is required to perform specific duties to his servants, he is liable for negligence in the discharge of such duties, no matter who may be the agent through whom he acts." *Fomes v. Phillips*, 39 Ark. 17.

Indiana.—Elliott, J.: "The duty which the master owes to the servant is one which he cannot rid himself of by casting it upon an agent, officer, or servant employed by him. The distinction between the negligent performance of duty by an agent or servant, and the negligent omission of duty by the master himself, is an important one. Where the duty is one owing by the master, and he entrusts its performance to an agent, the agent's negligence is that of the master. . . . If it be true that the agent's act is the master's act, then it must be true that the negligence involved in the act is that of the master himself. The rule which absolves the master from liability for the negligence of the fellow-servant has no application whatever where the agent stands in the master's place. The reason of the rule fails, and where the reason fails, so does the rule itself." *Indiana Car Co. v. Parker*, 100 Ind. 181.

Mitchell, J.: "When the premise is conceded that the duty to furnish reasonably safe and proper instrumentalities for the performance of the work required rests upon the employer, the conclusion logically follows that the consequences of a negligent failure to perform that duty must, no matter to whom it may have been committed, be visited upon the employer, and not upon the employee who suffered injury therefrom." *Cincinnati, etc., R. Co. v. McMullen* (Ind., 1889), 20 N. East Rep. 287; s. c., *infra*.

Kansas.—Valentine, J.: "At common law, whenever the master delegates to any officer, servant, agent, or employee, high or low, the performance of any duty which really devolves upon the master himself, then such officer, servant, agent or employee stands in the place of the master, and becomes a substitute for the master—a vice-principal—and the master is liable for his acts or his negligence." *Atchison, etc., R. Co. v. Moore*, 29 Kan. 632; 11 Am. & Eng. R. Cas. 243.

Massachusetts.—Colt, J.: "The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one, the master cannot escape the consequence of the agent's negligence; if the servant is injured in the other he may." *Ford v. Fitchburg R. Co.*, 110 Mass. 240.

Minnesota.—Berry, J.: "One employee becomes a vice-principal as respects another, only when he is entrusted with the performance of some absolute and personal duty of the master himself, such as the providing of proper instrumentalities with which the service required of an employee is to be performed, or the general management and control of the master's business or some branch of it." *Brown v. Minneapolis, etc., R. Co.*, 31 Minn. 553; 15 Am. & Eng. R. Cas. 333.

Mitchell, J.: "It is not the rank of the employee or his authority over other employees, but the nature of the duty or service which he performs, that is decisive; that, whenever a master delegates to another the performance of a duty to his servant which rests upon himself as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and to the extent of a discharge of those duties by the middleman, however high or low his rank, or however great or small his authority over other employees, he stands in the place of the master, but as to all other matters he is a mere co-servant. It follows that the same person may occupy a dual capacity of vice-principal as to some matters, and of fellow-servant as to others." *Langvall v. Woods* (Minn., 1889), 42 N. W. Rep. 1020.

Missouri.—Wagner, J.: "The duties are the duties of the master, and he cannot evade the responsibilities which are incident and cling to them by delegation to another. When the master appoints some other person to perform these duties, then the appointee represents the master, and though in their performance he may be and is a servant to the master, yet in those respects he is not a co-servant, a co-laborer, a co-employee, in the common acceptance of these terms." *Brothers v. Carter*, 52 Mo. 372; 14 Am. R. 424.

New York.—Church, J.: "The true rule, I apprehend, is to hold a corporation liable for negligence in respect to such acts and duties as it is required to perform as a master, without regard to the rank or title of

the agent entrusted with their performance. As to such acts the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed." *Flike v. Boston & A. R. Co.*, 53 N. Y. 549; 13 Am. R. 545.

Rapallo, J.: "The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises without regard to the rank of the employee performing it. If it is one pertaining to the duty the master owes to his servant, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of the operative the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant for its improper performance." *Crispin v. Babbitt*, 81 N. Y. 516; 37 Am. R. 522.

South Carolina.—*McIver, J.*: "The test as to whether an employee is the representative of the master is, not whether such employee has the power to employ or discharge hands, or to purchase or change machinery, for while these are some of the duties of the master, they are not all of his duties, and hence an employee who is not entrusted with either of these powers may still be the representative of the master. The true test is whether the person in question is employed to do any of the duties of the master; if so, then he cannot be regarded as a fellow-servant or co-laborer with the operatives, but is the representative of the master, and any negligence on his part in the performance of the duty of the master thus delegated to him must be regarded as the negligence of the master." *Gunter v. Graniteville Manuf. Co.*, 18 S. Car. 262; 44 Am. R. 573.

Vermont.—*Ross, J.*: "The doctrine now established . . . holds the master liable to a workman for injuries sustained from the negligent performance of duties which rest by the relation upon the master, whether the master performs such duties personally or through an agent or servant." *Davis v. Cent. Vermont R. Co.*, 55 Vt. 84; 11 Am. & Eng. R. Cas. 173.

Virginia.—*Fauntleroy, J.*: "Where a company delegates to an agent or employee the performance of duties which the law makes it incumbent upon the company to perform, his acts are the acts of the company—his negligence is the negligence of the company." *Moon v. Richmond & A. R. Co.*, 78 Va. 745; 17 Am. & Eng. R. Cas. 531.

Lewis, J.: "Where injuries are caused by the negligence of a servant who is charged with the performance of duties which by law is incumbent on the master to perform, such servant is regarded as the representative of the master, and in legal contemplation his negligence is the negligence of the master." *Baltimore & O. R. Co. v. McKenzie*, 81 Va. 71; 24 Am. & Eng. R. Cas. 395.

West Virginia.—*Green, J.*: "If a master delegates to a superintendent the performance of certain duties, to the extent of the discharge of those duties he stands in the place of the master; but as to all other matters he is a mere co-servant." *Criswell v. Pittsburgh, etc., R. Co.*, 30 W. Va. 798; 33 Am. & Eng. R. Cas. 232.

Snyder, J.: "When a railroad company puts a superintendent, foreman, or other employee in its place, to discharge some duty which it owes to its servants or employees, as to such duty such superintendent or other employee is not a co-servant, but the representative of the company; and as to such duty the company is bound by the acts or omissions of such middleman, the same as though the acts had been done or omitted by the company itself. Whenever such company delegates to another the performance of a duty to its servants which it has impliedly contracted to perform itself, or which vests upon it as an absolute duty, it is liable for the manner in which the duty is performed by the middle-

man whom it has selected as its agent; and to the extent of the discharge of these duties by the middleman, he stands in the place of the company, but as to all other matters he is a mere co-servant. The question in such case is not whether the company reserved to itself any oversight or discretion, but whether it did in fact clothe the middleman with power to perform its duties to the servant injured." *Riley v. Railway Co.*, 27 W. Va. 145.

Other States.—In still other jurisdictions, and these constitute the great majority, this criterion has been clearly applied and the cases decided with reference to it, although the courts have not stated it in general terms and announced its applicability to such cases.

Servant Performing Master's Duty to Supply Safe Place to Work.—In many cases at common law a master assumes towards the servant the duty of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, and whenever the master delegates to any officer, servant, agent, or employee the performance of this duty, then such officer, servant, agent, or employee stands in the place of the master and becomes his substitute, and the master is liable for his negligence. *Atchison, etc., R. Co. v. Moore*, 29 Kan. 632; 11 Am. & Eng. R. Cas. 243; *Whalen v. Centenary*, 62 Mo. 326; *Hannibal, etc., R. Co. v. Fox*, 31 Kan. 587; 15 Am. & Eng. R. Cas. 325. See also *Moore v. Wabash, etc., R. Co.*, 85 Mo. 588. Of course, where the place in which the work is done is openly and obviously defective the employee runs the risk.

DENVER, SOUTH PARK AND PACIFIC R. CO.

v.

DRISCOLL.

(*Colorado Supreme Court, April 19, 1889.*)

Fellow-servant—Superintendent of Work—Track-layer—Vice-principal.—The superintendent of the track-laying of a railroad, who has charge of a number of men, who employs and discharges them at his pleasure, and who has control of the cars, tools, and machinery employed in the work, is not the fellow-servant of a workman employed under him, but is the vice-principal of the company, and the latter is responsible for his negligence.

• **APPEAL** from District Court, Lake County.

This is an action for damages for personal injuries received by the appellee, who was plaintiff below, while in the employ of the appellant. Appellant was extending its line of railroad, and for that purpose had placed one Manly in full charge of the track-laying. Appellee was hired by Manly, and was under his directions and control at the time of the accident. The car upon which appellee was riding at the time was a small flat-car, without brakes. To check the speed

Facts.

of this car in going down grade, a stick was run through a hole in the bottom of the car, and pressed against one of the wheels. This arrangement appears to have answered the purposes of a brake very well, so that on the way down, just before the accident, the man applying this stick had complete control of the car until he took it off, under the instruction of the superintendent in charge, Mr. Manly. At the place of the accident the grade of the road was 90 feet to the mile; and it was made to appear in testimony that the brakeman refused to take off the brake the first time the order was given, whereupon Manly ordered him "to take off the brake, and let the car go," or "let her rip." In obedience to this last order, the brake was removed, and in a very few seconds the speed of the car was beyond control, and the car ran into another car on the track below, killing one man and wounding the plaintiff and others. The trial below resulted in a verdict and judgment for appellee for \$1500. Exceptions were duly reserved at the trial, and the case brought here by appeal. The remaining facts sufficiently appear in the opinion of the court, except the examination of the juror Altman, upon his *voir dire*. Upon examination of this juror, he answered, among other things, that he had some business dealings with the defendant company; that he had received some special accommodations in the way of commercial rates for travelling; and sometimes received favors in shipping goods over the road; that he expected to continue business and ship over the road; and that this fact might have a little influence with him, and might possibly affect his verdict. If the case should be evenly balanced, he would give the benefit of the doubt to the company. Whereupon appellee interposed a challenge for cause, which was sustained by the court, and the juror excused.

Teller & Orahood for appellant.

Joseph C. Murphey for appellee.

HAYT, J.—1. The first assignment of error relates to the ruling of the court in sustaining appellee's challenge for cause to M. D. Altman, one of the jurors called in the case. **Challenge of Juror.** It is contended upon the part of the appellant that, as the appellee was bound to maintain the issues in the case upon the trial by a preponderance of the evidence, the answers of the juror only amounted to a statement of that which he would be bound to do under the law, and therefore constituted no cause for challenge. We do not agree with counsel upon this proposition, as from the answers it seems that it was as a favor to the company that he would give it the benefit of a doubt under certain circumstances, and not because the burden of proof was upon the appellee. We think the answers of

Mr. Altman were such as to justify the court in sustaining plaintiff's challenge to him; but, aside from this, when a full examination of a juror leaves the question of his competency doubtful, we should hesitate to interfere with the ruling of the trial court thereon. *Grady v. Early*, 18 Cal. 111.

2. It is contended for appellant that the evidence was insufficient to warrant a submission of the case to the jury, and insufficient to sustain the verdict; also, that the complaint is insufficient to sustain the judgment thereon; that Manly and appellee were fellow-servants, engaged in the same line of duty or service; and that appellee cannot recover for injuries resulting from the negligence of his fellow-servant. There is much conflict in the authorities as to who are to be held as fellow-servants engaged in the common employment, so as to preclude a recovery by one upon the negligence of the other, and it would be extremely difficult to lay down a general rule applicable to all cases; but we are of the opinion that there is sufficient alleged in the complaint and shown at the trial to warrant the jury in finding that Manly's relations to the company were such as to make it responsible for the acts of which complaint is made. He was superintendent of the work, and had two foremen and quite a number of men under him, whom he employed and discharged at his pleasure, having such authority in the premises. He had control of the cars, tools, machinery, and men there employed. The car upon which appellee was riding at the time of the accident was used for hauling the iron rails, and for hauling the men to the boarding-house or camp. It is also shown that under Manly's directions the men put the tools on this car, and with Manly, and under his directions, the men got upon it to go down the track to the boarding place, about a mile distant, for the purpose of putting away the tools before quitting work for the night; that after the car was started Manly directed the man at the brake to check the car up at one point where there were some mules near the track, which order was obeyed. After passing the mules, Manly then ordered that the stick or brake be taken off entirely, and that the car be let run; that this order was given the second time, when the man controlling the said brake obeyed the order, and the car was accordingly allowed to go, its speed rapidly increasing so that it was soon beyond control, and, rounding a curve, it ran with great force against a car on the track loaded with iron, injuring appellee; that said loaded car was placed upon the track by order of Manly, without the knowledge of the appellee. The jury found that the injury was directly attributable to the negligence of Manly; and in no proper sense of the term was he a fellow-servant with appellee. The company had placed him in charge

Superintendent held to be vice-principal.

of the work, with full discretion to control and supervise it, and he must be treated in reference to this work as its representative,—as vice-principal. The company is answerable to all the under-servants for the negligences of such a representative, while acting within the scope of his employment. *Shear. & R. Neg.* § 102; *Whart. Neg.* § 229. In *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 390, 17 Am. & Eng. R. Cas. 501; it is said: "There is, in our judgment, a clear distinction to be made in their relation to their common principal between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants." In Kentucky, Ohio, California, and other states the distinction made in the case from which we have quoted has been recognized, and this distinction has been repeatedly pointed out by the decisions of this court, although the question here determined has not heretofore in this state been directly adjudicated. *Little Miami R. Co. v. Stevens*, 20 Ohio, 415; *Louisville & N. R. Co. v. Collins*, 2 Duv. (Ky.) 114; *Brown v. Sennett*, 68 Cal. 225; *Wright v. New York Cent. R. Co.*, 28 Barb. (N. Y.) 80; *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484; *Colorado Cent. R. Co. v. Ogden*, 3 Colo. 499. We shall not attempt to review the decisions to the contrary. They are carefully reviewed in the case of *Chicago, M. & St. P. R. Co. v. Ross*, *supra*, and declared against in the opinion in that case. We think the allegations of the complaint were sufficient, and that the evidence in support thereof was sufficient to warrant the submission of the case to the jury.

3. It is claimed that there was no evidence to sustain the finding that appellee was engaged in the employ of appellant at the time he received the injuries. The plaintiff testified that he was then working for the South Park R. Co., and several of those working with the plaintiff at the time testified that they were all, including the plaintiff, working for the South Park Co., and were paid by the South Park Co. This evidence is sufficient to support the finding, although no witness used the technical name given the defendant in its articles of incorporation. *Smith v. Cisson*, 1 Colo. 29. The judgment is affirmed.

Foreman and Subordinates as Fellow-servants.—See *Criswell v. Pittsburgh, etc., R. Co.*, 33 Am. & Eng. R. Cas. 232, note, 264.

Fellow-servants—Vice-principal—Yard-master Acting as Engineer.—A yard-master who goes upon an engine to act as engineer thereon, does not thereby cease to be the vice-principal of the company, and the company is liable if he directs one of his subordinates to undertake the dangerous duty of uncoupling cars, and thereby subjects him to a risk greater than that pertaining to his proper employment. *Hardy v. Minneapolis & St. Louis R. Co.*, 36 Fed. Rep. 637.

Same—Negligence—Sufficiency of Evidence.—The action being by a trainhand for a personal injury alleged to have resulted from the carelessness and negligence of the conductor, in ordering the train to leave the station before the plaintiff had time to perform a duty assigned him on top of the train and get down, and the evidence failing to show that the conductor gave the order to start prematurely or improperly, a motion for a nonsuit should have been granted. *Central R. Co. v. Smith (Ga.)*, 8 S. E. Rep. 211.

Same—Temporary Absence of Vice-principal.—The temporary absence of a section-master does not relieve the company from liability for an injury sustained in executing his instructions to employees, where the evidence shows that the employee was working under the instructions of the section-master in his absence. *Missouri Pac. R. Co. v. James (Tex.)*, 10 S. W. Rep. 332.

Same—Negligence of Vice-principal—Preponderance of Evidence.—On a claim for damages, made by a brakeman as intervenor in a suit for the appointment of a receiver, it appeared that one of the intervenor's duties was to tie the bell-cord running from the locomotives to the cars, after the locomotive was attached to the train. While discharging that duty, the train was suddenly started, causing the intervenor to lose his balance and fall to the ground. The intervenor based his right to recover on the liability of the company for the negligence of the conductor as vice-principal, and the question in issue was, whether the conductor had taken charge of the train. The intervenor and two other witnesses testified that the conductor was in charge, and their evidence was corroborated by the conductor's admission, and by the defendant's failure to account for the absence of the engineer in charge of the locomotive. Two of defendant's employees testified that the accident occurred before the train was fully made up and turned over by the yard-master to the care of the conductor. They were corroborated in this by intervenor's admissions and by his failure to explain why he had not attached the cord whilst the conductor was receiving his orders, as he might have done. On exception to the referee's report allowing plaintiff's claim, *held*, that the weight of the evidence was with the intervenor, and that the referee's report must be confirmed, although the evidence did not bear out a finding by him that the defendant's employees who testified in its behalf were guilty of collusion. *Missouri Pac. R. Co. v. Texas & Pac. R. Co.*, 38 Fed. Rep. 816.

STEPHENS

v.

HANNIBAL AND ST. JOSEPH R. CO.

(Missouri Supreme Court, November 12, 1888.)

Fellow-servants—Foreman—Subordinates—Vice-principal.—A foreman in charge of a gang of men, who are subject to his orders only, is the agent of the railroad company and is not a fellow-servant of one of his subordinates in respect to the orders given, and the company is liable for injuries arising through obedience to such orders.

Same—Orders—Duty of Servant to Obey.—In an action for personal injuries, it appeared that the foreman of a gang of section-hands directed his men to clear the track for an approaching train. Plaintiff left the track, but called the foreman's attention to some stones upon it, and the foreman thereupon said, "It is time you were getting them off." Plaintiff understood this remark as an order, and undertook to remove the stones when the train was about 100 yards away. He was struck by the engine and injured. *Held*, that the danger was not so open and obvious to the plaintiff that he ought to have disobeyed the order, and that a demurrer to the evidence was properly overruled.

Personal Injuries—Evidence—Measure of Damages.—In an action for personal injuries, evidence that the plaintiff is a married man and has a family is improperly admitted, and a new trial will be granted because of such error if the court are of the opinion that it had the effect of increasing the damages,

APPEAL from Circuit Court, Clay County.

Action by William D. Stephens against the Hannibal & St. Joseph R. Co. to recover damages for personal injuries sustained by the plaintiff whilst in the defendant's employ. An appeal from a judgment rendered for the plaintiff upon the first trial was sustained. See 28 Am. & Eng. R. Cas. 538. Upon a second trial plaintiff again recovered judgment from which the defendant appeals.

Strong & Mosman and *Huston & Parrish* for appellant.

Henry Smith for respondent.

BLACK, J.—This case was here before, and is reported in 86 Mo. 221. It is now freed from any question of negligence on the part of those in charge of the train, and stands **Facts.** on the alleged negligence of Rice, and the alleged contributory negligence of the plaintiff. Now, as on the former appeal, it appears the plaintiff and five others, under John Rice as their foreman, were engaged in raising a part of defendant's track. For that purpose rocks were distributed along the track

by the construction train. Plaintiff and the other laborers put them on the track, broke them with sledge hammers, and forced the pieces under the ties with tamping bars. The evidence shows that a west-bound passenger train was behind time. It was heard before it was seen, but, when first heard, the men could not tell whether it was on the defendant's road or a train on another road. The train came at a faster rate of speed than usual; and, when within 100 or 150 yards of them, Rice told the men to get off the track, and they did so. It was then discovered that there were two stones on the track, about six by twelve inches, as plaintiff says; or the size of a dinner bucket, as stated by Rice. Plaintiff says, "the foreman said, 'Clear the track,' and we all got off. I then said to Rice, 'Jack, there are two stones on the track,' and he said to me, 'It is time you were getting them off.' I understood this for an order. I undertook to get them out of the way of the train by putting them between the ties, and succeeded in doing this, but hadn't time to remove the tamping bar with which I was working, and it was struck while still in my hands, by the engine. The tamping bar struck my right arm, and turned me around, and I was struck on the left arm and side by the engine. I thought the stones might ditch the train." Says he first saw the train when Rice said, "Clear the track," and that he had just got off when he saw the stones, and called Rice's attention to them; and that the train was then about 100 yards away. Rice says he at the same time saw a hand car coming towards them, and he started forward to signal those in charge of it to get off the track; that, after going a few steps, Stephens was hurt; that the train was in sight when he told Stephens to get the rocks off; that in his opinion it was necessary to remove the stones to avoid danger; and that it was his duty to flag the train when there were obstructions on the track, but he did not flag it that morning. A number of plaintiff's ribs and his collar-bone were broken, and the left arm was so shattered that it had to be amputated. As Rice had charge of the gang of men, and they were subject to his orders only, there can be no doubt but he was the agent of the defendant, and not a fellow-servant with the plaintiff, in respect of the orders given. His negligence was the negligence of the defendant. Enough was said on this subject when the case was here before. The court refused an instruction in the nature of a demurrer to the evidence, and at the request of the plaintiff gave an instruction, the material portion of which is in these words: "And if the jury further find that plaintiff was one of such workmen so employed on defendant's track under Rice as such foreman, and that Rice recklessly, carelessly, and negligently ordered plaintiff to remove the stones from the track; and that to obey the order

at the time and under the circumstances was extrahazardous, but did not plainly imperil plaintiff's life or limb, and that plaintiff in obeying the order was injured because thereof, and without fault on the part of the plaintiff, then the jury will find for the plaintiff, and assess his damage at such sum, not exceeding fifteen thousand dollars, as will compensate him for the injuries sustained." To remove the stones from the track under the circumstances disclosed was surely accompanied with more danger than was ordinarily incident to the business in which the plaintiff was engaged; and the evidence tends to show negligence on the part of Rice in directing the removal of the stones at the time he gave the order. We do not understand these propositions to be controverted on this appeal. The chief contention is that the evidence shows that the danger was open and obvious to the plaintiff; that he ought to have disobeyed the order; and for these reasons the demurrer to the evidence should have been sustained.

Generally a servant cannot recover for those injuries resulting from causes seen and known by him. But, even when there is no order to do a given act, there are some modifications of the general rule. Thus it is held in many cases, where the servant knowingly incurs the risk of defective machinery, still, if not so defective as to threaten immediate injury, it is for the jury to determine whether there was negligence on his part. *Huhn v. Missouri Pacific R. Co.*, 92 Mo. 443; s. c., 31 Am. & Eng. R. Cas. 221, and cases cited. So, too, where the danger is patent, and is known to the servant, the master may be liable for injuries resulting therefrom, as when he has lulled the servant into a sense of security by insisting there is no danger, or has promised to remove the defect. *Wood, Mast. & Serv.* § 352; *Conroy v. Vulcan Iron Works*, 62 Mo. 36. And, more to the point in this case, a recent text-book uses this language: "If, therefore, the master orders the servant into a situation of danger, and he obeys, and is thereby injured, the law will not deny him a remedy against the master on the ground of contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even where, like the servant, he was not entirely free to choose." 2 *Thomp. Neg.* 975. There may be cases where the servant is ordered to do a particular act, and the order is so unreasonable, and the act so manifestly dangerous to life and limb, that the court, on the evidence, should declare the servant guilty of negligence in obeying the order of the master, and should direct a nonsuit. The general rule, however, is that the question is one for the jury. *Keegan v. Kavanaugh*, 62 Mo. 230.

It cannot be said the servant and master are on an equal foot-

ing, even where they have equal knowledge of the danger. To so say is against common experience, and in disregard of the fact that the servant occupies a position subordinate to the master. The primary duty of the servant is obedience. It does not follow, because the servant could justify a disobedience of the order, that he is guilty of negligence in obeying it. In the present case there was no equal knowledge of the danger, for the plaintiff began to get the stones out of the way the moment he was directed so to do. He did not have the opportunity to observe and calculate the distance to the train, or the rate of speed at which it was going, that the foreman had, whose duty it was to look out for this train, and be prepared for its coming. True it is, Rice's attention was directed to the hand car after he gave the order, but this was no fault of the plaintiff. The question of negligence on the part of the plaintiff was eminently one for the jury, and the demurrer to the evidence was properly overruled.

Obedience to
orders of su-
perior.

An objection to the plaintiff's instruction is that it does not furnish any proper limit to his right to recover. The limit given in the instruction is that the order of the foreman did not plainly imperil plaintiff's life or limb, and that he obeyed the order without fault on his part. The instruction is substantially in the language of this court, when this part was considered on the former appeal. The court, it is true, was not then attempting to formulate an instruction, still the instruction is not objectionable. As the plaintiff was, by the master, ordered to remove the stones, it cannot be said he was guilty of negligence in obeying the order, unless to do so was to clearly bring on danger to life or limb, and that is the instruction. The servant is not, at the peril of being discharged, bound to set up his judgment against that of his master about things over which there can be a difference of opinion in the minds of reasonably prudent persons.

The defendant's second and third instructions are to the effect that if Rice said, "You had better be getting them (the stones) off," or "It is time you were getting them off;" that the train was then about 100 yards distant, and approaching at a rapid rate,—then it was not the duty of the plaintiff to obey the order, and he cannot recover. These instructions were properly refused, for, as we have seen, it was for the jury to say whether or not plaintiff was guilty of negligence, and to determine that question from all the evidence. The fact that plaintiff might justify a disobedience of the order is not the criterion by which to determine whether he was negligent or not in obeying it. Nor do the facts predicated necessarily show negligence. The fact, if such it be, that plaintiff and the foreman had equal

knowledge of the approach of the engine, does not necessarily make them equally guilty of negligence, and hence the defendant's further instruction was properly refused. This results from what has been said. *Keegan v. Kavanaugh*, *supra*.

Towards the close of the evidence, plaintiff was asked by his attorney whether he was a married man, and, if so, how many children he had. Defendant objected. The court overruled the objection, but at the same time stated that the jury must not consider the question or answer in making up their verdict; and especially that it should not be considered in fixing the amount of the verdict, should they find for the plaintiff. The plaintiff then answered that he was married and had four children. This evidence as to the number of his children was incompetent. It could have no bearing on the case whatever, lest it be to increase the amount of damages. There is nothing in the case to justify the giving of exemplary damages, and the damages should be confined to compensation for the injuries sustained. As well might proof be made of plaintiff's financial condition. This, we have held, the plaintiff may not do, when the parent is suing for the death of a minor child. *Overholt v. Vieths*, 93 Mo. 423. Some countenance, it may be thought, is given for the admission of such evidence by what is said in *Conroy v. Vulcan Iron Works*, 75 Mo. 652, and in *Winters v. Hannibal, etc., R. Co.*, 39 Mo. 475. In the case last cited, and upon which the other is based, the evidence as to the number of children had been withdrawn, and the remarks about the competency of the evidence were wholly unnecessary. Besides, there was no claim in that case, as here, that the damages were excessive. We have no doubt but the trial court may exclude improper evidence during the progress of the trial, or by an instruction at the close of the evidence, and, when this is done, the fact that such evidence was heard by the jury will not operate as a reversal of the judgment. Here it is difficult to understand what effect the evidence had, for the jurors are told not to consider it; yet at the same instant the objection is overruled, and the evidence admitted. The verdict is for \$8000. The plaintiff was seriously injured, lost an arm, and was at the hospital three or four weeks, and he says he is unable to do a full day's work; is not half as stout as he was before he received the injury, and suffers at times from his side. This is the evidence as to damages, and there is no evidence of expenditures about being cured. He seems to have been waited on by the defendant's surgeon.

We do not say that this judgment should be reversed because of excessive damages; nor do we say that it should be reversed because of the evidence before noted, had a specific instruction as to the measure of damages been given; but in view of the

Damages—
Family of
plaintiff.

very general instruction as to damages, and the amount of the verdict, we cannot escape the conclusion that the incompetent evidence had its effect. Since this case must be again remanded for new trial, we suggest that the damages, in case of a recovery by plaintiff, be limited by the instructions to compensation for the pain suffered, time lost, and permanent injuries, occasioned by defendant's negligence. Of course, should expenses about being cured be shown, they may be recovered. On the other hand, if plaintiff was guilty of negligence contributory to the injuries, he cannot recover. If the approaching train was so close, and the danger so great, that a reasonably prudent person in the plaintiff's situation, and having such knowledge of the danger as he had, would not have attempted to remove the stones, then he was negligent. So if, in removing the stones, he performed the work in a negligent manner, when to have removed them in a careful and prudent manner would have avoided the calamity, then he cannot recover. These suggestions are not designed to exclude other instructions, but such as are given at the request of the parties or by the court of its own motion should conform with what has been said. That given by the court is subject to some criticism. The judgment is reversed, and the cause remanded for a new trial.

RAY, J., absent. The other judges concur.

Foreman and Subordinates as Fellow-servants.—Sec. *ante*, Denver, S. P. & P. R. Co. *v.* Driscoll, and note.

LAVALLEE

v.

ST. PAUL, MINNEAPOLIS AND MANITOBA R. CO.

(*Minnesota Supreme Court, March 11, 1889.*)

Fellow-servants—Statutory Liability—Operation of Statute.—Chapter 13, Gen. Laws 1887, making railroad companies liable to an employee for injuries caused by the negligence of a co-employee, applies only to those employees engaged in operating the railroads, and so exposed to the peculiar dangers attending that business.

APPEAL from District Court, Ramsey County.

Henry C. James for appellant.

M. D. Grover and *Flandrau, Squires & Cutcheon* for respondent.

GILFILLAN, C. J.—The plaintiff cannot recover, unless under chapter 13, Laws 1887. The deceased and the persons through whose negligence he received the injury from which he died were fellow-servants, and the injury occurred from their negligence, and no other cause, so that upon the principles of the common law there could be no recovery against defendant. Chapter 13 reads: "Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof, by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained within this state, and no contract, rule, or regulation between such corporation and any agent or servant shall impair or diminish such liability: provided, that nothing in this act shall be so construed as to render any railroad company liable for damages sustained by any employee, agent, or servant while engaged in the construction of a new road, or any part thereof, not open to public travel or use."

Statutory provisions.

The question is whether this statute includes all employees, agents, and servants of a railroad corporation, without regard to the character of the business in which they are employed. Taken literally, it does. But it is evident that in some respects, at least, it cannot be taken literally; for, as the court below in its memorandum, in deciding the motion for a new trial, aptly says: "According to its terms, the company is liable without regard to whether the employee is injured in the course of his employment or not." Of course, that could not have been intended. The plaintiff insists that the act applies to all employees; the defendant, that it applies only to those whose employment subjects them to the peculiar hazards pertaining to operating a railroad. From the authorities we get very little help in determining the question. Decisions from four states having statutes nearly similar to ours have been cited, to wit, Georgia, Wisconsin, Iowa, and Kansas. In *Thompson v. Banking Co.*, 54 Ga. 509, the supreme court held that the statute was not limited to any class of employees; and in *Georgia R. Co. v. Ivey*, 73 Ga. 499; s. c., 28 Am. & Eng. R. Cas. 392, when asked to reconsider its former decision, and the point was for the first time made that the act, if given unlimited operation, would be unconstitutional, the court adhered (much on the principle *stare decisis*) to its former decision, and also held the law constitutional. In *Ditberner v. Chicago, M. & St. P. R. Co.*, 47 Wis. 138, the supreme court of that state held the statute of that state to be constitutional, and not to be limited to those employed in operating railroads. In Iowa, under the original act (of 1862), the supreme court in *McAunich v. Mississippi & M. R. Co.*, 20 Iowa, 338, held the act valid on

Statute only applies to servant operating road.

its assumption that it embraced only those employed in the business of operating a railroad; and in the case of *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa, 52, the court emphasized its previous construction of the act, saying: "The manifest purpose of the statute was to give its benefits to employees engaged in the hazardous business of operating railroads. When thus limited, it is constitutional; where extended further, it becomes unconstitutional." The supreme court of Kansas, in *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35; s. c., 5 Am. & Eng. R. Cas. 594, and *Union Pac. R. Co. v. Harris*, 33 Kan. 416; s. c., 21 Am. & Eng. R. Cas. 584, holds the act of that state, adopted from Iowa, to be valid, and gives it the same construction. In *Herrick v. Minneapolis & St. L. R. Co.*, 31 Minn. 11; s. c., 11 Am. & Eng. R. Cas. 256, this court held that the Iowa statute did not violate that clause in the fourteenth amendment to the constitution of the United States which declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws;" and in the case in *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205; s. c., 33 Am. & Eng. R. Cas. 390, the supreme court of the United States held the Kansas statute not in violation of that clause of the amendment, nor of the clause of the amendment declaring that no state "shall deprive any person of life, liberty, or property without due process of law;" the court saying, in reference to the objection that the statute denied to all persons the equal protection of the laws: "Such legislation is not obnoxious to the last clause of the fourteenth amendment, if all persons subject to it are treated alike, under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed." In the case referred to there was no question that it came within the operation of the statute, if it had any effect whatever. The construction of the act was not in question.

The objection made to the construction of the statute which the appellant contends for is that, upon that construction, the statute would be what is sometimes called Class legislation. class legislation, by imposing upon one class of persons liabilities from which other persons in precisely the same circumstances are exempt. It is to be presumed, unless the language used excludes such presumption, that the legislature does not intend an act to so operate as to be open to that objection. Of course, the legislature must have the power to classify, when necessary, subjects for legislation, and make provisions for subjects within one class, without making them applicable to subjects in another, and the proper exercise of that power is not liable to the objection that it is class legislation. The practical limitation of the power to classify so as to avoid the imputation was stated by this court in *Nichols v. Walter*, 37 Minn. 264, as

"that the classification shall be made upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them." Applying this test, it is impossible to avoid the conclusion that the statute, if construed as appellant claims it ought to be, would be class legislation, not applying upon the same terms to all in the same situation, nor having any apparent natural reason for any distinction.

The frequency and magnitude of the dangers to which those employed in operating railroads are exposed; the difficulty, sometimes impossibility, of escaping from them with any amount of care, when they come; the fact that a great number of men are employed, co-operating in the same work, so that no one of them can know all the others, their competency, skill, and care, so that he may be said to voluntarily assume the risk arising from the want of skill or care by any one of the number,—are a sufficient reason for applying a rule of liability on the part of the employer to the employee so employed different from that ordinarily applied between master and servant. But no just reason can be suggested why such difference should be founded, not on the character of the employment, nor of the dangers to which those employed are exposed, but on the character only of the employer. We can see why the employer's liability should be greater when the business is that of operating a railroad, but cannot see why one individual or corporation should be held to a rule of liability different from that applied to another, when the employment and its hazards are precisely the same. We cannot illustrate this better than by using an illustration employed by the supreme court of Iowa in *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa, 52: "Suppose a railroad company employ several persons to cut the timber on its right of way where it is about to extend its road, and the land-owner employs a like number of persons to cut the timber on a strip of equal length along-side such right of way. If one of each set of employees shall be injured by the negligence of a co-employee, and the railroad employee can under the statute maintain an action against his employer and the other cannot, then it is clear that the law does not apply upon the same terms to all in the same situation." The legislature might intend to make such a difference, but it would require unmistakable terms to make us think so. We do not find such to be the character of the terms used in this statute. That language is rather indicative that it was intended to confine its operation to the case of employees engaged in operating a railroad, and necessarily exposed to the hazards attending that business, and not to take in the case of all employees of a railroad company, without regard to the kind of work in which they

are engaged. No other reason can be given for excepting in the proviso "employees while engaged in the construction of a new road, or part thereof, not open to public travel or use," though some of the dangers of that business may be in some degree similar to those of operating a road after it is open to public travel and use; that is, when it is operated. The terms of the proviso go far to show an intent to limit the effect of the act to companies operating railroads, and in that part of their business. The deceased, not being employed in operating the railroad, did not come within the rule established by the act. Order affirmed.

Statutes Abrogating Fellow-servant Rule.—See *Missouri Pac. R. Co. v. Mackey* (U. S.), and note, 33 Am. & Eng. R. Cas. 390, 394; *Whalen v. Chicago, R. I. & P. R. Co.*, and note, *post*, p. 141.

KANSAS CITY, FORT SCOTT AND GULF R. CO.

v.

KIER.

(*Kansas Supreme Court, February 9, 1889.*)

Fellow-servants—Negligence—Condition of Track.—A railroad company is liable to any of its employees operating its road, for the negligence of either one of its officers or employees whose duty it is to keep the road in a reasonably safe condition, and who culpably fails to perform such duty, or to give notice or warning thereof.

Same—Brakeman—Change in Condition—Notice.—It was the duty of the plaintiff, a brakeman, when his train was backing out of the station, to take a position on the platform of the car nearest the main line, and, when he neared the switch, to step off and adjust the switch and connect the main line. While performing this duty he received injuries in the following manner: The ground on the west side of the switch on the morning of the injury was level and hard, and had been in that condition for a long time. He passed the station, going east, at 8.21 in the morning, and returned to the station after dark, at 6.37 in the evening. After his trip down the road, and a short time before his return, the railroad company caused several carloads of cinders to be unloaded in and about the switch for ballast. They were thrown up in heaps and piles on either side of the track and not properly smoothed down, and were so thrown that the ground on either side of the track was raised to the height of several inches, and left soft and spongy. According to his usual practice the plaintiff, without any notice or knowledge of the changed and unsafe condition of the track or road-bed, stepped from the moving train for the purpose of turning the switch, when his feet struck the cinders in such a way as to cause him to lose his balance and be thrown under the train, thereby crushing and mangling his left foot to such an extent that amputation was necessary. *Held*, that, in the absence of contributory negligence upon

his part, the plaintiff was entitled to recover against the railroad company.

Contributory Negligence — Rules — Breach — Custom of Employee.—Where a railroad company establishes rules concerning the duties of conductors and others in opening and adjusting switches along its road, and notifies the officers, conductors, and other employees thereof, such rules must govern until abrogated or changed; but if a brakeman, under the directions of the conductor of his train, and in the presence and with the knowledge of the division superintendent of the road, who has charge of its management and directs the employees of the company in the performance of their duties, opens and adjusts the switch for a long time in a different manner than prescribed by the established rules, such rules are deemed changed or modified as to the brakeman obeying the orders of his conductor, with the knowledge and sanction of the division superintendent.

Same—Province of Jury—Conflicting Testimony.—Upon the testimony introduced in the case the court did not err in submitting to the jury the question of the contributory negligence of the plaintiff; and as the jury, by the verdict, found upon this question in favor of the plaintiff, this court cannot, upon the evidence, which is greatly conflicting, as a matter of law declare that the plaintiff was guilty of contributory negligence that would defeat his right of recovery.

ERROR from District Court, Montgomery County.

Wallace Pratt and Charles W. Blair for plaintiff in error.

J. D. McCue for defendant in error.

HORTON C.J.—On the 3d day of December, 1885, and for about two and one-half years prior thereto, Thomas B. Kier was a brakeman in the employ of the Kansas City, Fort Scott &

Facts. Gulf R. Co. on its regular passenger train running between Cherryvale, in Montgomery county, and Arcada, in Crawford county. The train made daily trips each way, leaving Cherryvale at 7.25 in the morning, and returning at 7.30 in the evening. In going to Arcada it passed Parsons at 8.21 in the morning, and on its return reached Parsons at 6.37 in the evening. The Parsons station was not on the main line, but was reached by passing over a switch, or spur track. The usual way of passing from the main line to the station was as follows: When the train was going east the spur track was connected to the main track, and the train was run backward over the spur to the station; when going west, the same connection was made, and the train was run forward to the station, and then run backward to the main line, when the switch was set in connection with the main line. It was the practice of Kier, and he alleged that it was his duty, when the train was backing out of Parsons, to take a position on the rear end of the train, and, when the proper point was reached near the switch, to step to the side of the car and adjust the switch to connect the main line. At the time of receiving the injury complained of he had just stepped from the car for the purpose of turning the switch.

He was thrown under the moving train of cars in such a position that the cars passed over his left foot, crushing and mangleing the same to such an extent that it had to be amputated in order to save his life. This action was brought to recover damages of the company for the injury so received. The grounds upon which the plaintiff seeks to charge his injury to the negligence of the company are set forth in the petition as follows: "That on the morning of the 3d day of December, 1885, and for a long time prior thereto, the ground where the switch was located was solid and hard, and had been in such condition; that the service required of him in the moving and adjustment of the switch could be done in the manner stated without injury to his person; that he was well acquainted with the condition of the locality, and the condition of the track and ground around the switch; that on the morning of the 3d day December the passenger train on which he was employed as brakeman left the city of Cherryvale on its regular schedule time for its trip to Arcada and return to Cherryvale; that it passed through the city of Parsons, and at that time the ground in and about the switch was in its usual good and safe condition, and he performed his required service in opening the switch in his usual manner as brakeman; that after the passenger train had left the city of Parsons, and before its return on the evening of said day, the company had caused to be deposited in and about the switch several carloads of cinders, which were by the gross carelessness and negligence of the employees of the company deposited and left in great heaps and piles upon either side of the track, and in and about the switch, so that the ground upon either side of the track was raised to the height of fifteen inches, and so spongy and soft that a person stepping from the car would sink into them to a great depth, thereby rendering the ground in and about the track in an uneven, soft, spongy, and dangerous condition; that when the passenger train reached the city of Parsons on its return trip to the city of Cherryvale on the 3d day of December, relying upon and believing the track to be in the same condition as when he passed over the same a few hours before, and without any information or knowledge of any change having been made, or that any cinders had been unloaded and deposited in and about the track and switch, or that the same, by reason of the gross carelessness and negligence of the company and its employees, had been left in the dangerous condition they were in, he stepped from the train for the purpose of turning the switch so that the train could and would pass onto the main track; that in stepping from the car he did so in the usual and ordinary manner, exercising due care to prevent injury; that when he stepped from the car for said purpose his feet sank into the cinders,

which were soft and spongy, and gave way under his feet, causing him to lose his balance, and throwing him under the moving train of cars of the company." Upon the trial, the evidence offered on the part of plaintiff tended to establish the foregoing allegations.

It is contended by the railroad company that the petition does not state facts sufficient to constitute a cause of action: and therefore that no negligence of the company was proved at the trial. In support of this contention it is said that the company owes to the public the duty of affording adequate instrumentalities for the transportation of its business, and to make transportation safe; therefore, that it had the right to haul its ballast, and put the same on the track just as it was done in this instance; that the company was not required to notify the plaintiff it was re-ballasting or repairing its road; that it was his duty to be on the constant lookout for ballast or repairs on the track, either by eyesight or inquiry; that it was his duty to notice the condition of the track, which was open to observation, and, if he failed to do so, it was such neglect, not only of his duty, but also of ordinary precaution for his safety, as to bar recovery for any damages thereby. This court has already decided that "the law does not require that a railroad company shall, as between it and its employees, guarantee the sufficiently, good order, and good condition of its tracks and roadway, but merely requires that the railroad company shall exercise reasonable and ordinary care and diligence to keep its tracks and roadway in a reasonably safe condition." *Atchison, T. & S. F. R. Co. v. Ledbetter*, 34 Kan. 331; s. c., 21 Am. & Eng. R. Cas. 555; *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kan. 660; s. c., 21 Am. & Eng. R. Cas. 637; *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412; s. c., 28 Am. & Eng. R. Cas. 341. This court, however, decided, in *Atchison, T. & S. F. R. Co. v. Holt*, 29 Kan. 152; s. c., 11 Am. & Eng. R. Cas. 206, that "the rule is, even under the common law, that a master employing servants upon any work, particularly a dangerous work, must use due and reasonable diligence that does not induce them to work under the notion that they are working with proper and safe machinery, while employing defective and dangerous machinery; and if an employee in injury on that account, and without fault of his own, the master is liable in damages." And in *Atchison, T. & S. F. R. Co. v. Moore*, 1b. 633; s. c., 11 Am. & Eng. R. Cas. 243, it is said: "In all cases at common law a master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work; . . . and at common law, whenever the master delegates to any officer, servant, agent, or employee, high or low, the per-

Right of com-
pany to deposit
ballast on
track.

formance of any of the duties which really devolve upon the master himself, then such officer, servant, agent, or employee stands in the place of the master, and becomes a substitute for the master,—a vice-principal,—and the master is liable for his acts or his negligence." In *Atchison, T. & S. F. R. Co. v. Moore*, 31 Kan. 197; s. c., 15 Am. & Eng. R. Cas. 312, the law is declared that "at common law a railroad company is liable to a brakeman for injuries caused by the negligence of the road-master or foreman, whose duty it was, over a portion of the road, to direct repairs, and keep it in a reasonably safe condition." See also *Hannibal & S. J. R. Co. v. Fox*, 31 Kan. 586 s. c., 15 Am. & Eng. R. Cas. 325. Therefore, under the decisions of this court, if the road-bed or yard in and around the switch at Parsons had been changed by the dumping of cinders in heaps or piles after the train had passed through that place on the morning of December 3d, going east, and prior to its return in the evening, and the dumping of the cinders left the road-bed or yard in a dangerous condition, then, if it was the duty of Kier, as alleged in his petition, to step from the car while it was moving slowly, for the purpose of turning the switch, and without having any notice of the recent change in the condition of the road-bed or yard he stepped from the car in his usual and ordinary manner, exercising proper care, and was thrown under the train, on account of the dangerous condition of the road-bed or yard in and about the switch, the railroad company would be liable. With this view, the petition states facts sufficient to constitute a cause of action. *Hall v. Mo. Pac. R. Co.*, 74 Mo. 298; s. c., 8 Am. & Eng. R. Cas. 106; *Hullehan v. Green Bay W. & St. Paul R. Co.*, 68 Wis. 520; s. c., 31 Am. & Eng. R. Cas. 322; *Kane v. Northern Cent. R. Co.*, 9 Sup. Ct. Rep. 16.

Counsel contend that, if the plaintiff was entitled to be notified of the changed condition of the road-bed or yard, then every other employee would be equally entitled to like notice; and therefore that the company would be seriously embarrassed in the operation of its road. As we have already decided that a railroad company is liable to any one of its servants operating its road for the negligence of either one of its servants whose duty it is to keep the road in a reasonably safe condition, and who culpably fails to perform such duty, or to give proper warning, we deem it unnecessary in this case to give further or additional reasons for the support of the law as declared by this court. It would seem to us, however, not very difficult or expensive, if a bridge, track, road-bed, or yard of a railroad company is in a dangerous condition, for the foreman having charge of the section or work to place thereon at night danger-signals, like red lights, so as to

Notice of
changed condi-
tion of track.

give warning to all the servants or employees of the company. *Hathaway v. East Tenn. V. & G. R. Co.*, 29 Fed. Rep. 489, is cited as decisive against any recovery by the plaintiff. That case was tried in the United States circuit court for the southern district of Georgia, and the opinion was delivered by Speer, J. In many respects the facts in that case are similar to this. In that case the plaintiff was a flagman, and the material deposited upon the track was sand instead of cinders. That case was taken from the jury on the ground that the facts showed no negligence on the part of the railroad company. If the decision was based upon the theory that there was no evidence tending to show "that the sand was unnecessarily placed at the spot where the flagman was injured, and unnecessarily kept there," the case might be distinguished from this; but if the decision in that case goes to the full extent claimed for it, that in attempting to repair, or in repairing, its track or road-bed a company may place the same, while making its repairs, in a dangerous condition, and require its employees to perform duties at night on such a track or road-bed, without any warning or notice of its changed and unsafe condition, we are not inclined to follow it. The various decisions concerning ice and snow upon the track or road-bed are not contrary to the views expressed by us in this and former decisions, because employees might be required, under some circumstances, to take notice of ice and snow from the operation of natural causes upon the ground or work where they are employed. Such risks and hazards, according to some of the decisions, are incident to their employment.

It is further contended that Kier was out of his place at the switch,—was voluntary performing a duty not his; therefore that he is barred from recovery by his contributory negligence. The rules of the company introduced in evidence are as follows: "(14) Every conductor must personally open and close switches used by his train or engine, and will be held responsible for the proper adjustment of the switches. When there is more than one train to use a switch, conductors must not leave the switch open for the following train, even when in sight, unless the conductor of the following train is at the switch, and takes charge of it." "(19) Station agents are held responsible for the safety of switches, which must always (except when a man is standing by) be kept locked, and right for trains running on the main track. (This is not intended to relieve conductors and others from care of switches they may use. Whoever throws a switch upon a side track must see it back on the main line.)" The conductor of the train testified that he regarded the opening of the switch as the duty of Kier. Kier also testified that it was his duty to

Plaintiff's
contributory
negligence in
opening
switch.

turn the switch; that he performed this duty during his entire service as brakeman on the passenger train; that he did this under the direction of the conductor; and that he had often performed this duty in the same way in the presence of the division superintendent. The conductor testified that he was under the immediate direction and supervision of the division superintendent; that this superintendent directed the employees on the train in the performance of their duty; that the division superintendent was his superior; and that he obeyed his orders in the operation of the road; therefore notice to the division superintendent was notice to the company; and when Kier, under the direction of the conductor, opened and adjusted the switch during all the time he was brakeman, in the manner he did, without any complaint or objection on the part of the division superintendent, who saw him perform his work, we do not think it can be said, as a matter of law, that Kier was out of his place at the time of receiving his injury. We think upon the testimony that the court did not err in instructing the jury as follows: "I may say to you, relative to these rules and regulations, they may be modified at the will of the defendant in this action by those having authority to do so, verbally or otherwise, and in charge and control of its business; and if you find or have the right to infer from the evidence which has been offered on the trial of this cause that any of its rules have been so modified by this defendant, by those having authority to do so, then such modification, whether in one form or the other, is to be accepted by you. But if there has been no modification you would not be justified in so finding."

It is also contended that the evidence shows that Kier fell over the switch-block by his own carelessness, and that the cinders dumped upon the road-bed or yard had nothing whatever to do with his injury. The evidence in the case is greatly conflicting, but, as the jury credited Kier and his witnesses, and as the trial court approved the verdict, we cannot disregard this evidence and say that Kier brought his misfortunes on himself by his own recklessness. Whether the defendant was guilty of negligence causing and contributing to his injury was one of the leading issues in the case. Upon the evidence and instructions, the jury found in favor of Kier, and, although there was ample evidence to justify a different verdict, the facts have been determined by the jury adversely to the company; and, as there was sufficient testimony before the jury to support the allegations of the petition and the verdict, we cannot interfere.

The evidence of E. O. Brown as to the safety of a person stepping from a moving train going six or seven miles an hour, even if erroneously received, is not sufficient for a reversal. He

Conflicting
testimony—
Province of
jury.

was only permitted to give his opinion in answer to one question. The testimony of Kier that he had daily stepped off the moving train to set and adjust the switch while in the service of the company as brakeman was more conclusive than any mere opinion.

Finally, it is contended that the trial court committed error in instructing the jury upon the law of exemplary or punitive damages. The verdict was for \$7000. Kier at the time of his injury was 39 years of age. For 12 years he had been engaged in railroading, and intended it as his business in life. As brakeman and car cleaner he was earning \$85 per month, and was in good physical health. Therefore, considering the injury that he received, the amputation of his foot, the diseased condition of his leg at the time of the trial, and his inability to move around except upon crutches, the verdict was not excessive. The instruction complained of is subject to criticism. Courts, in such cases as this, should not instruct concerning gross negligence, unless the same amounts to wantonness (Southern Kan. R. Co. v. Rice, 38 Kan. 398; s. c., 34 Am. & Eng. R. Cas. 316; Atchison, T. & S. F. R. Co. v. Gants, 38 Kan. 608; s. c., 34 Am. & Eng. R. Cas. 290; Kansas Pac. R. Co. v. Whipple, 39 Kan. 531), and should not instruct upon gross negligence, even if amounting to wantonness, unless there is sufficient evidence before the jury to render it necessary (Kansas Pac. R. Co. v. Peavey, 29 Kan. 169; s. c., 11 Am. & Eng. R. Cas. 260). In this case the evidence as to gross negligence, if any, is very slight; but, in view of the damages awarded, we do not think the instruction sufficiently material to reverse the judgment. In the case of Kansas Pac. R. Co. v. Peavey, *supra*, we held a similar instruction misleading, where it was apparent from the evidence that the engineer was not guilty of such gross negligence as implied wilful injury. In that case the damages awarded were excessive, \$6500 being allowed for the loss of a thumb and first finger. The reversal was not solely upon the ground of the misleading instruction on gross negligence, but for other manifest errors, and also for excessive damages.

Other points are presented in the briefs, which we have fully considered, but did not think it necessary to consume time to discuss. Upon the whole record we cannot say that any error was committed by the trial court so prejudicial to the railroad company as to justify a new trial. All the justices concurring.

MOTION FOR REHEARING.

PER CURIAM. In a very forcible and able argument counsel for the railroad company contend that another trial should be

awarded, and to that end there should be a rehearing, instead of an affirmance, as directed in the opinion heretofore filed. One or two questions are submitted, which were not presented upon the original hearing, and these, therefore, will not be considered. *State v. Coulter*, 40 Kan. 673. All the other questions are sufficiently disposed of in the original opinion, excepting the one concerning the instructions as to gross negligence and exemplary damages. We stated in our former opinion that the testimony as to gross negligence, if any, was very slight, but that in view of the damages awarded we were inclined to think that the instructions concerning punitive or exemplary damages were not sufficiently material to reverse the judgment. A re-examination of all the testimony convinces us that the negligence established was not wanton, wilful, or malicious; one or the other of which elements must appear to justify punitive or exemplary damages. *Leavenworth, L. & G. R. Co. v. Rice*, 10 Kan. 426; *Southern Kan. R. Co. v. Rice*, 38 Kan. 402, 34 Am. & Eng. R. Cas. 316; *Kansas Pac. R. Co. v. Whipple*, 39 Kan. 531. Where there is no testimony showing that the negligence is so gross as to amount to wantonness, and no wilful or malicious acts are proven, actual or compensatory damages merely is the rule. Therefore to leave the question of punitive or exemplary damages to the jury, when there is no testimony which would warrant a verdict for such damages, is improper. *Kansas Pac. R. Co. v. Peavey*, 29 Kan. 169, 11 Am. & Eng. R. Cas. 260; *Kennedy v. North Mo. R. Co.*, 36 Mo. 351; *Philadelphia Traction Co. v. Orbann*, 119 Pa. St. 37, 34 Am. & Eng. R. Cas. 432. It is probable, as heretofore stated, considering the age of Kier and his injuries, that the damages awarded him were compensatory only; but as the jury were instructed that, if they found gross negligence "to have entered into and formed or caused the injuries of which Kier complains," they might allow punitive or exemplary damages, we cannot with absolute certainty say the verdict of \$7000 was not enhanced thereby. This much, however, is clearly established by the verdict, separate and apart from the erroneous instructions: First, that culpable negligence is to be imputed to the railroad company, as charged in the petition; second, that Kier was not guilty of any negligence directly or proximately contributing to his injuries; and, third, that upon the testimony he was entitled to recover his actual or compensatory damages.

Punitive damages not recoverable.

We have concluded, considering the testimony and verdict, that as we cannot clearly decide the erroneous instructions might not have increased or exaggerated the verdict, the judgment must be reversed, unless Kier, within 30 days, remits \$2000 thereof. If this is done, the

Remittitur.

judgment of the district court will be affirmed for \$5000. We may fairly assume, upon the testimony and verdict, that the jury intended to embrace in the verdict the actual damages for which Kier was entitled to recover. The erroneous instructions only related to the measure of damages; therefore these instructions only affected the damages allowed. It is apparent from all the testimony that \$5000 will not exceed the actual damages suffered. If the verdict had been for \$5000 it would be clear beyond doubt that the error alleged did not and could not have prejudiced the rights of the railroad company. *Thomas v. Dansby*, 41 N. W. Rep. 1088. While the damages found are not excessive, yet they are a full round sum for the injuries complained of, and hence, on account of the error committed, the necessity of a modification of the judgment. If Kier had lost the portion of his limb which has been amputated, in the service of his country, he would be entitled to a pension, under the law, of at least \$30 per month; that would amount to \$360 a year. The yearly interest of \$5000 at 7 per cent will be \$350. If, however, the plaintiff below is unwilling to accept a judgment of \$5000, a new trial will be awarded on account of the erroneous instructions referred to. Several cases are cited from this court to show that the erroneous instructions were harmless. In *Kansas Pac. R. Co. v. Little*, 19 Kan. 269, the instruction permitting the recovery of exemplary damages was not excepted to, and the damages allowed were only \$1050; therefore no reversal. In *Atchison, T. & S. F. R. Co. v. Moore*, 31 Kan. 197; s. c., 15 Am. & Eng. R. Cas. 312, and in *Missouri Pac. R. Co. v. Mackey*, 33 Kan. 298, 22 Am. & Eng. R. Cas. 306, no errors were committed by the trial courts, and therefore, although the judgments were large, this court did not feel justified in interfering. The judgment of the district court will be reversed, unless the remission of \$2000 is allowed as stated.

Fellow-servants—Injuries Caused by Defective Track or Roadbed.—The great weight of authority in this country has settled the rule that negligence in keeping the roadway of a railroad in a safe and suitable condition is negligence, which as between an employee injured thereby and the company is chargeable upon the company. *Chicago & N. W. R. Co. v. Sweet*, 45 Ill. 201; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183; *Hall v. Missouri Pac. R. Co.*, 74 Mo. 298; 8 Am. & Eng. R. Cas. 106; *Lewis v. St. Louis, I., M. & S. R. Co.*, 49 Mo. 495, 21 Am. Rep. 385; *Vautrain v. St. Louis, etc., R. Co.*, 8 Mo. App. 538; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.), 441; *Moon v. Richmond & A. R. Co.* (78 Va.), 745, 17 Am. & Eng. R. Cas. 531; *Torians v. Richmond & A. R. Co.* (Va.), 4 S. E. Rep. 339; *Baltimore, etc., R. Co. v. McKenzie* (Va.), 24 Am. & Eng. R. Cas. 395; *Hullehan v. Green Bay, etc., R. Co.*, 68 Wis. 520, 31 Am. & Eng. R. Cas. 322; *Houston, etc., R. Co. v. Dunham*, 49 Tex. 181; *Davis v. Central Vt. R. Co.*, 55 Vt. 84; 45 Am. Rep. 490; 11 Am. & Eng. R. Cas. 173; *Calvo v. Charlotte, etc., R. Co.*, 23 S. Car. 526, 28 Am. & Eng. R. Cas. 341; *Atchison, etc., R. Co. v. Moore*, 29 Kan. 633; 31 Kan. 197; 11 Am.

& Eng. R. Cas. 243; 15 Am. & Eng. R. Cas. 312; Kansas City, etc., R. Co. v. Kier (Kan., 1889), 21 Pac. Rep. 770; Drymala v. Thompson, 26 Minn. 40; Colorado Cent. R. Co. v. Ogden, 3 Colo. 499; O'Donnell v. Allegheny V. R. Co., 59 Pa. St. 239; Patterson v. Pittsburgh & C. R. Co., 76 Pa. St. 389; Louisville & N. R. Co. v. Bowles, 9 Heisk. (Tenn.) 866; 1 Alb. L. J. 119; Hardy v. Carolina Cent. R. Co., 76 N. Car. 5; Central R. Co. v. Mitchell, 63 Ga. 173, 1 Am. & Eng. R. Cas. 145. If the duty of keeping a bridge in repair is entrusted by the company to its foreman, his negligence is that of the company. *Bowen v. Chicago, B. & K. C. R. Co. (Mo.)*, 8 S. W. Rep. 230. Compare *Gaffney v. New York, etc., R. Co.*, 15 R. I. 456, 31 Am. & Eng. R. Cas. 265; *Fagundes v. Central Pac. R. Co. (Cal., 1889)*, 21 Pac. Rep. 437. In the last case a track repairer caused the death of a laborer riding on a train, by interfering with a switch with which he had no concern. A few states, however, have not accepted this doctrine. *Howd v. Mississippi Cent. R. Co.*, 50 Miss. 178; *New Orleans, etc., R. Co. v. Hughes*, 49 Miss. 258; *Mobile, etc., R. Co. v. Smith*, 59 Ala. 245; *Harrison v. Central R. Co.*, 31 N. J. L. 293. The English common law decisions are also opposed to it. Thus in *Waller v. South Eastern R. Co.*, 2 H. & C. 102, it was held that the guard of a train and the plate layers, whose duty it is to attend to the rails over which the train passes, are engaged in one common object, the safe conduct and transit of the train, and therefore no action can be maintained against the company by the representatives of a guard of a train killed by the train running off the line, in consequence of the negligence of the ganger of the plate layers to renew the decayed metals which fasten the chairs to the sleepers of the railway.

While the rule is generally applicable that when it is the duty of the employee of a railroad corporation, in the course of his work, to ride over the road of the corporation, it is its duty to provide a track suitable and sufficient for the purpose, and to maintain it in good order, it must be considered with some qualification when the road has become dilapidated and out of repairs, and is in the process of reconstruction, in which work the employee is engaged. Thus, in a New York case, *B.*, plaintiff's intestate, was one of a number of laborers in defendant's employ, engaged in repairing a track, the use of which had been partially abandoned, and which had fallen into decay. A construction train upon which *B.* was riding, ran off the track at a crossing and he was killed. Rain had fallen the night before, and the space alongside the rails for the flanges of the wheels to run in had become filled up with mud, which had frozen and so caused the accident. *T.* was defendant's general foreman, having charge of the work of reconstruction and repairs. He had charge of the train at the time of the accident. It was his duty to see that the crossings were properly cleaned and kept in safe condition. He attempted to perform this duty, but failed to do it properly. In an action to recover damages for alleged negligence causing the death, it was held that the negligence causing the injury was that of a co-employee, and that defendant was not liable; also that the fact that the duty was imposed upon *T.* of reconstructing the entire road, did not alter his relations as co-employee here. *Rochester, etc., R. Co. v. Brick*, 98 N. Y. 211, 21 Am. & Eng. R. Cas. 605.

38 A. & E. R. Cas.—9

MELOY

v.

CHICAGO AND NORTHWESTERN R. CO.

(Iowa Supreme Court, May 29, 1889.)

Injuries to Employees—Assumption of Risks—Civil Engineer—Wrecking-train.—A civil engineer employed by a railroad company in the construction of its road only assumes the risks incidental to the operation of the trains over a new, partly completed roadbed and unballasted track in a reasonably prudent and careful manner, and does not assume risks which are the result of running trains at an unreasonably high rate of speed over such track, especially when it appears that the company negligently failed to keep such track in proper condition.

Same—Evidence—Running of other Trains.—In an action to recover damages for injuries received owing to the derailment of a train on a new and unballasted track, evidence that another train had travelled over the track alleged to be defective, and at the same rate of speed as that which was derailed, on the morning of the day of the accident, is inadmissible when the condition of the road-bed is such that the passing of trains over it made it more dangerous.

Same—Speed of Train—Verdict—Sufficiency of Evidence.—Where there is evidence that a newly laid track was uneven, that it contained short curves caused by the sliding of the track on the wet clay, that, in places, one side of the track was raised while the other had sunk, and that the cars swayed from side to side in such a manner as to induce those upon them to believe that there was danger that the train would be ditched, the jury are warranted in finding that the train was run at a dangerous rate of speed, although no witness testified specifically that the speed was too great to be safe.

Same—Contributory Negligence—Travelling in Tool-car.—Although the result may show that it was more dangerous to travel in the tool-car of a wrecking-train by reason of its position in the train than in the way-car, an employee is not, as a matter of law, guilty of contributory negligence by so travelling if the tool-car is as well adapted for travel as the way-car, and is fitted up and intended by the company to be used for that purpose,

APPEAL from Superior Court, Cedar Rapids.

Action by E. S. Meloy against the Chicago & Northwestern R. Co., to recover damages for personal injuries sustained by the plaintiff, a civil engineer in the defendant's employ, while riding upon a wrecking-train belonging to the defendant. The defendant appealed from a verdict and judgment for the plaintiff, and, the judgment having been affirmed (see 33 Am. & Eng. R. Cas. 358), the appellant filed a petition for a rehearing.

Hubbard, Clark & Dawley for appellant.

Ward & Herman and *Mills & Kceler* for appellee.

ROBINSON, J.—In the summer of the year 1884 plaintiff was in the employment of defendant, and was engaged as a civil engineer in superintending the laying of track on a new line of railway which defendant was then constructing from Belle Plaine to What Cheer. He was not required to see that the track was kept in good condition after it was laid. On the 3d day of August of the year named the track had been laid from Belle Plaine to a point about 35 miles south. On that day plaintiff, who was in Belle Plaine to visit his family, was ordered to go to the front with a wrecking-train, which was going down to assist in replacing on the track a derailed engine. The train consisted of an engine, which was run backwards, pushing the tender and pulling the cars; a wrecking-car, with derrick, next to the engine; an old way-car, fitted up and used as a tool-car, next to the wrecking-car; three flat-cars loaded with steel rails; three loaded with ties; and at the rear end a box-car, fitted up and used as a way-car. The plaintiff, with other employees of defendant, rode in the tool-car. At a point about 21 miles south of Belle Plaine the engine, derrick-car, tool-car, and forward trucks of the first car of rails left the track, and the tool-car was badly broken. At the moment of the accident plaintiff was standing on a platform of the tool-car, whither he had gone, as he states, for the purpose of jumping from the train, under the belief that an accident was imminent. He was caught between two cars in such a manner that his left leg was crushed, making amputation necessary. Other injuries were also received. The evidence on the part of plaintiff tends to show that the track where the accident occurred was in bad condition at that time; that it was laid through a deep cut, over wet, soft earth; that it had settled unevenly, and was out of line; that the condition had been made worse by a storm of rain the night before; and that at the time of the accident the train was running from 12 to 17 miles an hour. The way-car did not leave the track. Plaintiff charges that the train was negligently run at too high a rate of speed over a track known to defendant to be in a dangerous condition, by an inexperienced and incompetent engineer; and that he did not contribute to the injuries of which he complains. The jury found specially that defendant was negligent in maintaining and repairing the road-bed and track at the time and place of the accident; that the train in question was "running at a dangerous and negligent rate of speed, considering the condition of the road-bed at that place and time;" and that plaintiff was not guilty of contributory negligence. The amount of the verdict and judgment was \$10,000. An opinion was filed in this cause on a former submission (33 Am. & Eng. R. Cas. 358), but a rehearing was

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granted on the petition of appellant, and the cause again submitted.

1. It is contended by appellant that the risks incident to riding over a new, partially completed road-bed and unballasted track were necessarily contemplated in the employment of plaintiff; that the accident in question was a risk of that kind; and therefore that he is not entitled to recover in this action. But plaintiff only consented to incur such risks as were incident to the operation of trains upon such a track in a reasonably prudent and careful manner. He did not assume risks which were the result of running trains at an unreasonably high rate of speed over track in a bad and dangerous condition. Defendant was chargeable with knowledge of the condition of its track at the place of the accident. It knew that it was laid over wet and yielding earth; that proper drains had not been constructed to carry off the rainfalls and the water which came from the banks, and that the storm of the night before had aggravated the bad condition of the road-bed, and had made greater caution in running trains over it necessary. There was conflict in the evidence as to the condition of the track and the rate of speed at which the train in question was run; but there was evidence tending to support the special findings of the jury that defendant was negligent in not keeping the road-bed and track in better condition, and that it was negligent in the matter of running the train. Plaintiff did not assume any risk resulting from such negligence. He had, it is true, superintended the laying of that portion of the track in controversy, but it was laid several weeks before the accident occurred, and plaintiff's responsibility, therefore, had ceased. It was then in charge of a roadmaster.

2. Appellant complains of the refusal of the court below to allow it to prove that similar trains had been run at the same rate of speed over the same track on the same day, without any appearance of danger. Appellant was permitted to prove the condition of the track at the time in question, and for some time before. The fact that other trains were run over it just before the accident, at the same rate of speed, would not justify a negligent and improper running of the train in question. The condition of the road-bed was such that the passing over it of loaded trains made it more dangerous. It is urged on rehearing, that the evidence was admissible to show that defendant did not have notice of the condition of the road. That point was not made on the first submission of the cause, but it would hardly be sufficient to accomplish the purpose now claimed for it. It might show that the locomotive engineers who ran the trains in question did not know that the condition of the road was bad; but it appears that the engineer

**Risks assumed
by plaintiff.**

**Evidence as to
running of
similar trains.**

who run the train which was wrecked, the roadmaster, who was directly responsible for its condition, and other employees knew or were chargeable with knowledge of its condition.

3. It is further contended by appellant that there was no evidence that the train was run at an unsafe rate of speed. It is true that no witness testified specifically that the speed was too great to be safe. But there was evidence showing that the track was uneven; that it contained short curves caused by the sliding of the track on the wet clay; that in places one side of the track was raised on planks, while the other side was down in the clay, and was, as stated by one witness, "out of sight in the mud." The cars swayed from side to side in such a manner as to cause plaintiff to believe that there was danger that the train would be ditched. The rear brakeman applied brakes without orders, in anticipation of danger, to check the speed of the train. It did not require an expert to tell that the condition of the track made the rate of speed dangerous. It was competent for the jury to find that the train was negligently run at a dangerous rate of speed from the evidence submitted.

Evidence that train run at unsafe rate of speed.

4. The court charged the jury as follows: "If you find from the evidence that at the time of the departure of the wrecking train on which the plaintiff took passage the defendant had provided a safe and suitable car on said train for the accommodation of the employees of defendant in riding on said train, then the plaintiff, in the exercise of ordinary care and prudence, was in duty bound to take passage on such car, and if he neglected so to do, and sought a more dangerous part of the train on which to ride, and was thereby injured, then such act was negligence on the part of plaintiff; and if such negligence directly contributed to his own injury, then he ought not to recover. But if you find from the evidence that the defendant had provided more than one car on said train for such purpose,—that is, if in this case you find that the so-called 'way-car' and the so-called 'tool-car' were both provided by defendant for such purpose,—or if you find from all the facts and circumstances connected with the making up and operating of the train by the defendant that the plaintiff had good and reasonable grounds for believing, and that he did honestly believe, in the exercise of ordinary care and prudence, that both of said cars had been so provided for such purpose, then he was justified in selecting either car for his passage as to him seemed best in the exercise of such ordinary care and prudence,—under such state of facts plaintiff would not be negligent. If you find, however, from all the facts and circumstances connected with the case, that a man of ordinary care and prudence under such circumstances would not have acted

Not necessarily contributory negligence to ride on tool-car.

as the plaintiff did, but that in the exercise of such ordinary care and prudence he would have taken passage in the rear caboose as a safer place, and would have avoided the tool-car as a more dangerous place, then the plaintiff was guilty of negligence, and, if such negligence contributed directly to produce his injuries, he ought not to recover." It is insisted by appellant that the verdict is contrary to this paragraph of the charge, for the reason that the way-car at the rear of the train was a safer place than the tool-car in which to ride, and that by riding in the latter plaintiff contributed to the injuries of which he complains.

The cases of *Player v. Burlington, C. R. & N. R. Co.*, 62 Iowa, 727, 12 Am. & Eng. R. Cas. 112, and *Doggett v. Illinois Cent. R. Co.*, 34 Iowa, 284, are especially relied upon by appellant as supporting its claim; but this case is different from those in several important particulars. In this case the road of defendant had not been opened to the public for traffic. The plaintiff was not a passenger within the ordinary meaning of that term, nor was he a trespasser. He was rightfully on the train. Some of the evidence tends to show that he had been directed to aid the wrecking crew in replacing the derailed engine, and that he was acting in response to that direction. It is true that it was not a part of his duty to do so, but if he had been asked to render assistance in that work by competent authority, and had consented to do so by word or act, he became on that occasion, for all practical purposes, a part of the wrecking crew, and was entitled to ride in the place provided for them. The tool-car was made for a caboose or way-car, with platforms at the ends, doors, steps, and seats, but at the time in question was used as a car in which to carry a supporting-jack, switch-rope, block, pulley, chain-hooks, bars, and other articles used in connection with wrecks. It contained accommodations for a wrecking crew, and was occupied by some of them on the trip in question. The car at rear of the train, used as a way-car or caboose, had been in use for some weeks, and was used for transporting employees of defendant and supplies, tools and various articles, as frogs and a wire switch-rope. At the time of the accident it contained an ice-box, a tool-box, and perhaps other articles of the kinds already named. It was an ordinary box-car, which had been furnished with seats, and steps at the sides. So far as the evidence shows, it was no better adapted to the use of travellers than was the tool-car, and was less convenient. It is said that the latter was an old, weak car, a mere "egg-shell;" but one of the witnesses for defendant testified that there was not much difference as to strength between it and an ordinary freight car. The evidence does not show that plaintiff was aware of any weakness in the car, nor that he was directed to ride elsewhere, although the conductor knew where he was riding. In view of all these

facts, we are of the opinion that it cannot be said as a matter of law that plaintiff was negligent in riding in the tool-car, nor that it was more dangerous than the way-car. It is true that, if he had been in the latter when the accident occurred, he would have escaped injury, but the course pursued by plaintiff must be considered in the light of the circumstances which induced him to ride in the tool-car, rather than in the light of subsequent events. The relative safety of the different cars of a train must depend, not alone upon the places they occupy with respect to the engine, but in part upon the dangers to be encountered. In case of a front-end collision of a broken bridge the safest car might be the one furthest from the engine; while in case of a defective road-bed, which is made more dangerous by each passing car, the safest car might be the one next the engine. We think it was for the jury to determine from all the evidence submitted whether or not plaintiff contributed to his injuries, and they found specially that he did not. It is not shown that he rode in a car not designed by defendant for that purpose. If he was in fact one of the wrecking crew, and, in the exercise of ordinary care and prudence, rode in the place provided for them, he was not guilty of contributory negligence. The charge, as an entirety, submitted fairly and with sufficient fulness the various issues involved, including the question of plaintiff's negligence. We cannot say that the verdict is contrary to the charge, nor that it is unsupported by the evidence. The facts of the case are unusual, and must govern its determination.

5. The special findings of the jury render it unnecessary to consider some of the assignments of error. We discover no error in the case prejudicial to appellant. A rehearing was granted in this case because of some language in the former opinion in regard to the alleged negligence of plaintiff, which does not correctly represent the views of this court. We reach the same conclusion which we did on the first submission. The judgment of the superior court is affirmed.

Risks Assumed by Employees of a Railroad Company.—See *Meloy v. Chicago & N. W. R. Co.*, 33 Am. & Eng. R. Cas. 358; *Criswell v. Pittsburg, etc., R. Co.*, 33 Ib. 232; *Philadelphia, etc., R. Co. v. Hughes*, 33 Ib. 348; *Olson v. St. Paul, etc., R. Co.*, 33, 386; *Indianapolis & St. L. R. Co. v. Watson*, and note, 33 Ib. 334, 346; *Wilson v. Winona & St. P. R. Co.*, 31 Ib. 244, and note, p. 246, where cases are collected.

COLUMBUS AND WESTERN R. CO.

v.

BRIDGES.

(Alabama Supreme Court, April 17, 1889.)

Injuries to Employees—Construction of Bridge—Duty of Company—Floods.—In the construction of its bridges, a railroad company is not bound to provide against unusual and extraordinary floods, and it is not liable in damages for the death of the conductor and engineer of the construction train, who attempted to travel across a bridge constructed in the usual manner fifteen years previously, but of which the foundation had recently been washed away by an unprecedented flood.

Same—Signals—Company's Rules.—Where the rules of a company require that the danger and safety signals should be given at the end of a bridge which is being approached by a train, negligence rendering the company liable for the death of an engineer under Alabama Code, § 2590, which provides that the employer shall be liable in damages when the injury is caused by the negligence of any of his servants in charge of any signal, cannot be imputed to the company if the safety, instead of the danger, signal was given at the further end of the bridge.

Same—Contributory Negligence—Flood.—Where the evidence shows that the conductor and engineer of a construction train knew the manner in which the trestles of a bridge were constructed, and the unprecedented character of the flood, and it appears that he had examined the bridge during the day, and knew, or should have known, that the water was rapidly rising, he was guilty of such contributory negligence as will preclude recovery of damages for his death if he attempted to run his train over the bridge under such circumstances.

Same—Negligence Causing Death—Continuance of Life—Damages.—In an action under section 2590 of the Alabama Code, which authorizes the personal representative to maintain an action if an injury results in the death of an employee, the continuance of life constitutes an element of damages; and evidence that the deceased was afflicted with a complaint which affected the probable continuance of life is admissible.

Same—Punitive Damages—When Recoverable.—When there is no evidence tending to prove, or from which could be inferred, wilful, wanton, or reckless negligence on the part of a railroad company, the court ought, in an action for damages for negligently causing the death of an employee, to charge that punitive or vindictive damages cannot be recovered.

APPEAL from Circuit Court, Tallapoosa County.

Action by Mrs. Anna Bridges, administratrix of John J. Bridges, her deceased husband, against the Columbus & Western R. Co., to recover damages for the death of plaintiff's intestate. At the trial the court sustained an objection to a question, addressed to a medical witness for the plaintiff on cross-examination, whether the deceased was not suffering from permanent disease for a number of years prior to the accident, and the defendant excepted to the ruling. The court having instructed the jury that "under the statute, the damages are in their nature punitive,

and the law leaves it with the jury to fix the same, being governed by what they deem just and proper as fair-minded, honest, and reasonable men," the defendant excepted, and requested that the jury be charged that "under the facts of this case, punitive or vindictive damages cannot be recovered." This charge having been refused, the defendant excepted. The jury returned a verdict for the plaintiff, whereupon defendant appealed.

Geo. P. Harrison, Jr., and J. M. Clifton for appellant.

W. D. Bulger, Thos. L. Bulger, and J. C. Richardson for appellee.

CLOPTON, J.—The statutes regulating the system of pleading require that all pleadings shall be as brief as is consistent with perspicuity and the presentation of the facts and matter to be put in issue is an intelligible form; and also provide that any pleading unnecessarily prolix, irrelevant, or frivolous may be stricken out on motion of the adverse party. Code 1886, §§ 2664, 2665. It may be conceded that some of the counts of the complaint contain irrelevant and redundant averments, which should have been stricken out on motion of defendant. But the refusal of the court to strike them out is not a reversible error, unless it affirmatively appears that thereby prejudice resulted to defendant. *Goldsmith v. Picard*, 27 Ala. 142.

Plaintiff's intestate was an employee of defendant in the capacity of conductor and engineer of a construction train. The injuries which caused his death were received while attempting to pass with his train over a bridge across the Tallapoosa river, from the west to the east side.

The trestle which constituted the approach to the bridge from the east gave way under the weight of the train, in consequence of the foundations having been washed out by the overflowing water, caused by an unusual flood. The action is brought by plaintiff as administratrix under the "Employer's Act," which composes sections 2590-2592 of the Code of 1886. Negligence is charged in two respects: *First*, in the alleged defective foundation of the trestle; and, *secondly*, in the signal averred to have been given by the watchman on the bridge.

The rule governing the liability of railroad companies for injuries caused by floods should be regarded as well defined and settled by an almost unbroken line of adjudicated cases. It rests on the general principle that the measure of the company's duty in constructing and keeping the ways, works, machinery, and plant free from dangerous defects is such care and diligence as a man of caution and prudence would exercise under like cir-

Pleading—Irrelevant averments.

Facts.

Railroad company not liable for unprecedented flood.

cumstances. The company is bound to bring to the construction of its ways and works the knowledge and skill of engineering generally known and applied in such business, and to provide against such casualties as a cautious and prudent man possessing the same knowledge and skill would or should reasonably foresee and anticipate. In the location and erection of bridges and trestles regard should be had to the size and nature of the stream, the character and feature of the adjacent country, and the relative position and formation of the abutting land, its liability to overflows, and their probable extent and effect. They should be so constructed as not to be subject to the risks and perils arising from rainfalls, known to experience to be incident to the particular section of the country, though rarely occurring, or which competent and skilful engineers should reasonably anticipate. But they are not bound to provide against unusual or extraordinary floods, such as have never been known to occur previously, and which could not have reasonably been foreseen by competent and skilful persons. *Pittsburg, F. W. & C. R. Co. v. Gilleland*, 56 Pa. St. 445, was an action for an injury caused by the continuance of a culvert, which, it was alleged, was so negligently constructed as not to furnish sufficient vent for all the water flowing down the channel of the stream. After substantially saying that in such case proper engineering should observe the size of the stream, the character of its channel, and the declivity of the circumjacent territory which forms the watershed, and supply the means of avoiding the injury which would result from locking up the natural flow or obstructing its passage so as to cause a reflux in the times of ordinary high water, Agnew, J., says: "Beyond this, prudent circumspection cannot be expected to look, and there is therefore no liability for extraordinary floods,—those unexpected visitations, whose comings are not foreshadowed by the usual course of nature, and must be laid to the account of Providence, whose dealings, though they may inflict, wrong no one."

The evidence clearly establishes that the flood was not only unusual and extraordinary, but greater and more destructive than had ever before happened in the memory of the inhabitants,—a flood which human ken could not have foreseen, nor the greatest caution and prudence could have reasonably anticipated. There is no liability on defendant for not having provided against the dangers and consequences of such a flood. *International & G. N. R. Co. v. Halloren*, 3 Am. & Eng. R. Cas. 343, *Houston & T. R. Co. v. Fowler*, 8 Am. & Eng. R. Cas. 504, 12 Am. & Eng. R. Cas. 196; *Pat. Ry. Acc. Law*, §§ 30, 31.

Not controverting this rule, plaintiff contends that there was

negligence on the part of the company in the construction and maintenance of the foundations of the trestle, which concurred with the flood in producing the injury to her intestate. Notwithstanding the flood may have been unusual and unprecedented, if the insufficient construction of the trestle was the proximate and real producing cause of the injury, the defendant would be liable; but, if the flood was of such overpowering and destructive character as to produce the injury apart from and independent of the particular negligence alleged in constructing the foundations of the trestle, there is no liability, though there may have existed some negligence in their construction and maintenance. *Baltimore & O. R. Co. v. Sulphur Springs Independent School-dist.*, 96 Pa. St. 65; 2 Am. & Eng. R. Cas. 166. The true test is, Was the trestle so negligently constructed as to be insufficient and insecure in cases of usual and ordinary floods incident to that section? If it was sufficient and safe at such times, though insufficient to stand against extraordinary floods, negligence in its construction cannot be regarded as the real producing cause of the injury. The evidence shows that the trestle had been constructed about 15 years previously, in the manner in which such trestles are generally constructed by the best-managed railroad companies, and had stood, during all that period, on the same or similar foundations, affording safe passage for engines and trains without accident or objection; and nothing is shown to have occurred which indicated danger in its continuance. On these facts, the court should have instructed the jury that there is no ground to impute negligence to defendant in its construction or maintenance.

Liability for negligence in construction of trestle.

The plaintiff, however, further insists that the negligence of the watchman at the bridge, in giving the safety, instead of the danger, signal when the the train was approaching the bridge from the west, concurred with the flood in causing the injury. The contention is based on subdivision 5, § 2590, Code, 1886, which provides that the employer is liable to answer in damages to the employee "when such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, points, locomotive, engine, switch, car, or train upon a railway, or any part of the track of a railway." On the question of fact whether any signal was given, the evidence is in conflict. Railroad companies have authority, and, it may be said, generally it is their duty, to prescribe suitable rules and regulations for the direction and management of their trains, for the purpose of protecting their employees as well as passengers. The rules provided by defendant were introduced in evidence, and

Negligence of watchman in giving signal.

prescribe the manner in which signals must be given to signify whether the train shall move forward, stop, or move backward; and also that the person of the watchman must be kept in sight, as a signal to approaching trains that all is right. There is also evidence that the signal of safety must be given at the end of the bridge which is being approached by the train. Unless a signal is given in accordance with the rules of the company, a conductor or engineer is not authorized to rely on it, and, if he does, and injury ensues to him in consequence thereof, there being no other act of negligence contributing to produce it, the negligence which renders the company liable under the fourth subdivision of section 2590 cannot be imputed to the company.

We have heretofore held that the "employers act" does not take from the employer the defence of contributory negligence. *Mobile & B. R. Co. v. Holborn*, 84 Ala. 133. The statute expressly declares that the employer is not liable if the employee knew of the defect or negligence, and failed, in a reasonable time, to give information thereof to the employer, or to some person superior to himself in the employment of the employer, unless he was aware the employer or such superior already knew of such defect or negligence. In this case there was neither time nor opportunity in which to give the defendant notice, and the company could not have known of the defect or negligence,—no room for the operation of this provision of the statute. No person superior to plaintiff's intestate in the employment of defendant is shown to have been present. He was both conductor and engineer of his train, directed its management, and controlled its movements. He was under no orders from any superior to move his train from the west to the east side of the river on that evening. His attempt to cross the bridge was of his own volition, no doubt prompted to do so by a desire to be, on the next morning, at a place most convenient to prosecute the work in which he was specially engaged—repairing the trestles which had been washed out on either side of the river. The evidence tends to show that he had examined the bridge during the day, and knew, or should have known, that the water was rapidly rising. If he knew the manner in which the trestle was constructed, the unprecedented character of the flood, the imminent danger to the trestle by the overflow of the river, and the rapid rising of the water, and with such knowledge, and under such surroundings, attempted, without compulsion or necessity, the hazardous passage of the bridge, his negligence sufficiently contributed to his injury to defeat a recovery by plaintiff.

Section 2591 authorizes the personal representative to maintain an action, if the injury results in the death of the employee, and directs the distribution of the recovery. The statute does

not prescribe or fix the measure of damages, neither are they submitted to the arbitrary discretion of the jury. It has no punitive purpose, and the common-law rules as the measure of damages are applicable. It is wholly unlike, in its objects and purposes, the statute of February 5, 1872, which was intended to prevent homicide. As pecuniary gain from a continuance of life constitutes an element of damage in this class of cases, the court should have admitted the evidence that plaintiff's intestate was afflicted with a pneumonic complaint, which affected the probable continuance of life. There is no evidence tending to prove, or from which could be inferred, wilful, wanton, or reckless negligence on the part of the company. The charge requested by defendant, that on the facts punitive or vindictive damages cannot be recovered, should have been given. *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159, 35 Am. & Eng. R. Cas. 466.

Right to punitive damages.

We have considered and endeavored to state the principles which should govern the case on another trial, without applying them specially to the several rulings of the court, deeming such application unnecessary; and, as there was no opportunity to give the defendant information of the defect or negligence, we regard it unnecessary to consider the demurrer, based on the ground that the complaint omits to aver such facts.

Reversed and remanded.

Liability of Railroad Companies for Injuries Caused by Violent Floods.—See *Ellet v. St. Louis, etc., R. Co.*, and note, 12 Am. & Eng. R. Cas. 183, 186.

Contributory Negligence of Engineer in Running Over Dangerous Track.—See *Sweeney v. Minneapolis & St. L. R. Co.*, 22 Am. & Eng. R. Cas. 302.

WHALEN

v.

CHICAGO, ROCK ISLAND AND PACIFIC R. CO.

(*Iowa Supreme Court, October 20, 1888.*)

Injuries to Employees—Negligence—Pleading—Question in Issue.—A complaint alleged that as cars were being backed up plaintiff, a brakeman, signalled the person in charge of the engine to slow up, and when the car was approaching the car to which it was to be coupled, and was within five or six feet of the stationary car, plaintiff stepped forward to adjust the coupling, when another brakeman on the train signalled the person in charge of the engine to back up and the car was thrown violently back, catching and crushing plaintiff's hand. *Held*, that although the petition

alleged the accident to have been caused by the negligence of the brakeman and of the person in charge of the engine, it was not error for the court only to submit to the jury the question whether the person in charge of the engine was guilty of negligence, there being no evidence tending to show that the brakeman was negligent.

Same—Statutory Liability—Volunteer—Negligence of "Wiper."—A "wiper" in the employment of a railroad company who has charge of an engine and is performing the duties of another employee is not a volunteer, and the company is liable to a brakeman for injuries sustained through his negligence, under section 1307, Iowa Code, which provides that railroad companies "shall be liable for all damages sustained by any person" "by any mismanagement of the engineers or other employees of the corporation."

Same—Evidence of Negligence.—Where a brakeman signalled the person in charge of the engine to slow up and another brakeman thereafter signalled him to back up, there is evidence tending to show negligence on the part of the person in charge of the engine if it is shown that he gave it a "kick" which caused the cars to come together with unnecessary violence, and to catch and injure the hand of the first brakeman whilst engaged in making a coupling.

Same—Excessive Verdict—Permanent Injuries.—A verdict for \$2300 for personal injuries, of which \$320 was for loss of time, is not excessive where it appears that plaintiff was 23 years old at the time of the trial; that because of the injury the thumb of the right hand was amputated and the two fingers next to it permanently injured; that plaintiff was unable to do the same work he previously did; that he was earning \$40 a month at the time of the accident, and that at the time of the trial he was earning only \$1.10 per day in another line of employment.

APPEAL from District Court, Louisa County.

Plaintiff was a brakeman in the employ of the defendant, and brought this action to recover damages for an injury received because of the negligence of the defendant when he was attempting to make a coupling. Trial by jury, verdict for the plaintiff, and judgment. The defendant appeals.

E. E. Cook and *E. W. Tatlock* for appellant.

R. Caldwell and *A. Sprague* for appellee.

SEEVERS, C.J.—The ground of negligence stated in the substituted petition upon which the plaintiff bases his right to recover is "the gross carelessness of the person who was in charge of the engine, and the brakeman who was on top of the car; that, as the cars were being backed up, plaintiff signalled the person who was in charge of the engine to slow up; and when the car was approaching the car to which it was to be coupled and was within five or six feet of the stationary car, plaintiff stepped forward to adjust the coupling, when the brakeman on the train signalled the person who had charge of the engine to back up, when the car was thrown violently back, thus catching and crushing plaintiff's hand; that the engineer was not at his post, but that the person who had charge of the engine was the "wiper."

Negligence alleged in petition.

1. The court, in stating the issues to the jury, stated the plaintiff's claims as follows: "That while plaintiff was about to couple some cars attached to an engine to some stationary cars, and after the plaintiff had given the person in charge of the engine a signal to 'slow up,' another brakeman of defendant gave such engineer or person in charge of the engine a signal to 'back up,' and thereupon such person in charge of the engine negligently, and without warning to plaintiff, backed the engine with cars attached thereto so as to catch and crush or injure the hand of the plaintiff; . . . that, in so doing, the person in charge of the engine was guilty of negligence."

Negligence of brakeman properly withdrawn from jury.

It will be observed that the only question submitted to the jury was whether the person in charge of the engine was guilty of negligence, and the court did not err in so doing. It is true, it is stated in the petition that the injury was caused by the negligence of such person and the brakeman, but as there was no evidence tending to show the brakeman was negligent the court rightly withdrew such issue from the jury. There was no evidence tending to show that the brakeman was negligent in giving the signal at the time or in the manner he did. We deem it proper to say that an amendment to the substituted petition in no manner changes the allegations of the latter as to the grounds of negligence or as to the person who was guilty thereof. We think the court fairly and sufficiently stated the issues to the jury.

2. It is said that there is no evidence tending to show that the person in charge of the engine was not a volunteer, and therefore the defendant is not responsible for what he did. He is designated as the "wiper" in charge of the engine. He was an employee of the defendant, and was running or operating it on the defendant's road when attached to a train or part of a train of cars; and if, by his "mismanagement," the plaintiff was injured, the defendant is clearly liable. The statute so provides. Code, § 1307.¹ In no sense was he a volunteer. At most he was performing the duties of another employee. It is also said in this connection there was no evidence tending to show the train was being made up at the usual and regular time. This is imma-

"Wiper" in charge of engine not a volunteer.

¹ Iowa Code, § 1307: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers, or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any way connected with the use and operation of any railway, or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

terial. The train was being operated on the defendant's road. But we think there was such evidence. The brakemen were in their proper places, and the usual signals given, and efforts made to couple the cars together. Under such circumstances, if the train was being operated by persons who had no authority to act, or at an improper time, the burden was on the defendant to so show.

3. It is also said there is no evidence tending to show negligence, and reliance is placed in part on the matters we have discussed. In addition thereto, it is said there is no evidence

Evidence of negligence. tending to show that there was any negligence on the part of the person in charge of the engine. In considering this question it will be conceded that the signal given him to "back up" was entirely proper, and he did right in obeying it; but if, in so doing, he recklessly or negligently caused the cars to be thrown together with unnecessary violence, then he may have been guilty of negligence. There was evidence tending to show that when the engine was "backing up" the plaintiff gave a signal to "stop," and the engine "slowed up;" and when the cars were a proper distance apart the plaintiff attempted to make the coupling, when the person in charge of the engine gave it a "kick" which caused the cars to come violently together, and the plaintiff's hand was caught between the cars and was injured. It was, we think, for the jury to say whether the cars came together with unusual and unnecessary violence, and whether the person in charge of the engine was guilty of negligence. Certainly we cannot, as a matter of law, determine whether the cars were thrown together with too much violence, or not; and it may be the jury should have found otherwise; but clearly, in our judgment, there is evidence upon which the verdict can with propriety be sustained, and this is true as to the question of contributory negligence. We cannot say that the plaintiff was guilty of such negligence. In fact we think he was not, unless, possibly, in attempting to make the coupling with mittens on his hands. But a proper instruction was given on this subject, and the jury found otherwise.

4. The defendant asked that 27 special interrogatories be submitted to the jury. Sixteen of them were submitted and answered by the jury, and counsel for the defendant insist that the court erred in refusing to submit the others. Special complaint is made of the refusal to submit the second, third, fourth, fifth, eighth, twentieth, and twenty-fifth interrogatories. No. 3 is as follows: "Do you find from the evidence that the accident to the plaintiff was in whole or in part caused by any act of his own, either of commission or omission?" This interrogatory is too general. No

Submission of special interrogatories.

specific fact is called for, unless it can be said the contributory negligence of the plaintiff is such a fact. The general verdict is a complete and sufficient response to this interrogatory, and the second, in legal effect, is precisely like it. The fifth and eighth interrogatories, in substance, are whether the person on the engine was the servant or employee of the defendant, and whether he was engaged in the line of his employment. That he was an employee, and in charge of the engine, and was running it,—that is, he was acting in the capacity of engineer,—is not denied. But the defendant insists that there is no evidence which shows that he was acting within the line of his employment, or which expressly shows any consent on the part of the defendant that he was so acting. What we have heretofore said sufficiently indicates that, in our opinion, this was immaterial under the circumstances. The jury are asked in the twentieth and twenty-fifth interrogatories to say how much they allow as actual damages, and how much for the plaintiff's incapacity to work in the future, and for what length of time. We deem it sufficient to say that these interrogatories are immaterial. No specific fact is called for, and answers thereto could not possibly in any manner impair the force and effect of the general verdict. The remaining interrogatory, No. 4, in substance and legal effect, is like Nos. 2 and 3. For the reasons stated, the court did not err in refusing to submit any more special interrogatories than it did. The Code provides that special interrogatories may be submitted to the jury, and the jury may be required to find "upon any particular questions of fact." Code, § 2808. Of course such fact or facts must be material and pertinent to the matter in controversy, and the interrogatories must ask a response as to the existence of some particular fact, and not embrace a series of facts which are necessarily included in and determined by the general verdict.

5. The instructions are criticised by counsel, and said to be erroneous, and that instructions asked and refused should have been given. We deem it sufficient to say that we think the instructions given are full, fair, and in every respect unobjectionable. They cover the whole ground, and therefore the instructions asked were properly refused. It is also said that the verdict is contrary to the instructions, but we are unable to concur in this proposition. We think it was for the jury to say whether the plaintiff had sufficient time to withdraw his hand after the speed of the cars was increased, and after he was aware of, or with reasonable diligence ought to have known, such fact.

The verdict is for \$2300, of which amount \$320 was for loss of time, and the residue must have been for pain, suffering, and inability to earn as much in the future as before the accident;

and it is urged the verdict is excessive. There was evidence tending to show that the plaintiff was 23 years old at the time of the trial. Because of the injury the thumb of the right hand was amputated, the two fingers next to it were injured, and the evidence tended to show such injury was of a permanent character. At the trial they were crooked, and the plaintiff was unable to do the same work he previously did. Nor was his arm as strong. He was not able to work for eight months after the accident. He was earning forty dollars a month at the time of the accident. At the time of trial he was working as a section-hand, and earning \$1.10 a day. We are unable to say, under such circumstances, the verdict is excessive. Affirmed.

Verdict not excessive.

Excessive Damages for Personal Injuries.—See *Houston & T. C. R. Co. v. Lee*, 34 Am. & Eng. R. Cas. 452, and cases collected in note, p. 456.

Construction of § 1307 Iowa Code, Imposing on Railroad Companies Liability for Negligence of their Employees.—The statute before the court in the principal case has been the subject for judicial construction in a large number of other cases. It has been held that a workman in a railway company's shops is not within the statute (*Potter v. Chicago, etc., R. Co.*, 46 Iowa, 399); but a person engaged in working on a bridge and obliged to ride on the company's train (*Schroeder v. Chicago, etc., R. Co.*, 41 Iowa, 344), a section-hand (*Fransden v. Chicago, etc., R. Co.*, 36 Iowa, 372), and a hand engaged on a gravel or dirt train (*McKnight v. Iowa & M. R. Const. Co.*, 43 Iowa, 406; *Deppe v. Chicago, etc., R. Co.*, 36 Iowa, 52. See *Locke v. Sioux City R. Co.*, 46 Iowa, 109), have been held to be within the act. Plaintiff, a section-hand in the employ of defendant, was directed to get on a loaded moving train, by the conductor and others in charge of the train, to go to another place to help to unload it, and on attempting to do so was thrown down, and received personal injuries. *Held*, that such injuries occurred in the "use and operation" of the train, within the meaning of the statute. *Rayburn v. Central Iowa R. Co.* (Iowa), 35 N.W. Rep. 606. An employee of a railroad company, whose duty it is to assist in loading and unloading gravel cars, and to perform any other service required of him in or about such work, and to ride back and forth on the gravel cars, is a person employed in the operation of the road, within the meaning of the act. *Handelun v. Burlington, C. & N. R. Co.*, 72 Iowa, 709.

An employee whose duties consist in wiping off engines and in opening and shutting the doors of a round-house is not such an employee "connected with the use and operation of the railway" as can recover for the negligence of a fellow-servant in shutting such doors. *Malone v. Burlington, etc., R. Co.*, 61 Iowa, 320; 11 Am. & Eng. R. Cas. 165. Where the regular brakeman of a train is absent, and the proper and safe management of the train so requires, the conductor has authority to supply the place of such absent brakeman; and for the time being such person is an employee of the railroad and entitled to recover for injury caused by the negligence of a co-employee. *Sloan v. Central Iowa R. Co.*, 62 Iowa, 728; 11 Am. & Eng. R. Cas. 145. If an employee is injured while riding on a hand-car through the negligence of the boss in charge, the company is liable. *Hoben v. Burlington, etc., R. Co.*, 20 Iowa, 562. And a private detective, injured while walking on track, in accordance with directions of company, and negligently run over, is within the protection of the statutory provision.

Pyne v. Chicago, etc., R. Co., 50 Iowa, 223. A person injured in operating a ditching machine, which is carried on a car and worked by the movement of the car on the railroad track, comes within the provision; and evidence tending to show that the injury was caused by the negligence of co-employees should be submitted to the jury. *Nelson v. Chicago, etc., R. Co. (Iowa)*, 35 N. W. Rep. 611. A laborer employed by a railway company, on a train used for hauling sand, to assist in loading and unloading the cars, rode upon the train in passing between the pit and the points on the track where the sand was deposited. *Held*, that as, in the performance of his duties, he was exposed to all the ordinary risks arising from the operation of the train, he was within the class of employees to whom the statute gives a remedy. *Handelun v. Burlington, etc., R. Co.*, 72 Iowa, 709. But an employee whose duty is to repair cars while standing upon the track, and who is sometimes required to ride on the trains of the company from place to place, is not employed in the operation of the road in such sense as to bring him within the protection of the provision. *Foley v. Chicago, etc., R. Co.*, 64 Iowa, 644. But where an employee was injured by appliances connected with the round-house, it was held that it was not error to instruct the jury that it was a part of plaintiff's duty to keep such appliances in a safe condition, or that it was the duty of another employee of the same kind to do so, and that they both, or either of them, neglected to do so, then the plaintiff could not recover, the employees not being engaged in the operation of the road. *Manning v. Burlington, etc., R. Co.*, 64 Iowa, 240; 15 Am. & Eng. R. Cas. 171. And where employees are engaged in elevating coal to a platform, to supply the engine, their duties are not so connected with the use and operation of the railroad, that one of them could recover for injuries received through the negligence of the other. *Stroble v. Chicago, etc., R. Co.*, 70 Iowa, 555; 28 Am. & Eng. R. Cas. 510; and see *Luce v. Chicago, etc., R. Co.*, 67 Iowa, 75.

Injuries to an employee by reason of the negligence of another, both engaged in the work of repairing a track, such injury not resulting from the operation of the railroad, are not within the provision of the statute. *Watson v. Chicago, etc., R. Co.*, 68 Iowa, 22. And where an accident, by which an employee is injured, is caused by the act of an inferior employee acting under the direction of such superior, the latter cannot recover for an injury received. *Dewey v. Chicago, etc., R. Co.*, 31 Iowa, 373. An employee who stands in the relation of vice-principal to the men under his control is an employee within the meaning of the section, and can recover of a railroad company by reason of the negligence of the men selected by himself, and whom he may discharge or retain in his employment (or the employment of the company) as he sees fit. It is not provided that the negligent and the injured employee shall be co-employees in the same general employment, in the sense that they must be equal in power and authority; all that is required is, that both shall be employees of the corporation. *Houser v. Chicago, R. I. & P. R. Co.*, 60 Iowa, 230; 8 Am. & Eng. R. Cas. 500.

The statute does not exonerate the injured party from the necessity of exercising reasonable care in order that he may recover. *Murphy v. Chicago, etc., R. Co.*, 45 Iowa, 661. A receiver who is managing a railway under the direction of the court is within this section, and may be charged and a recovery maintained against him as a person operating a railway. *Sloan v. Central Iowa R. Co.*, 62 Iowa, 728; 11 Am. & Eng. R. Cas. 145. The fact that a lessee may be held liable under this section does not prevent recovery against the owner of the road (*Bower v. Burlington, etc., R. Co.*, 42 Iowa, 546); and the running of special trains over the railway by a construction company, in constructing it, is operating a railway, within the meaning of the statute. *McKnight v. Iowa & M. R. Co.*, 43 Iowa, 406.

A mining company is not liable for injuries caused to one of its employees by the negligence of a coemployee. *Peterson v. Whitebreast Coal & Mining Co.*, 50 Iowa, 673; *Troughear v. Lower Vein Coal Co.*, 62 Iowa, 576.

Injuries to Servant—Liability—Evidence of Negligence.—Deceased, a section-hand, was directed to go along the track to get some tools. A train with a tender in front started in that direction and deceased went on it until it stopped short of the place to which he was going. He then left the tender and started on his way along the track. For some purpose he stopped on the track but a short distance from the tender, which moved along and ran over him whilst going at a very slow rate of speed. The injury occurred at a place where the law did not require any signals to be given for the protection of any person. It was not shown that the engineer or any other person operating the train was incompetent, nor even that the engineer was negligent. The evidence, however, tended to show that the deceased was on the track so near to the tender that the engineer could not see him. *Held*, that the evidence was not sufficient to charge the railroad company with liability for the accident. *Trinity & S. R. Co. v. Mitchell (Tex.)*, 10 S. W. Rep. 698.

CHASE

v.

BURLINGTON, CEDAR RAPIDS AND NORTHERN R. CO.

(*Iowa Supreme Court, September 7, 1888.*)

Injuries to Employees—Negligence—Province of Jury.—Plaintiff, a "car-catcher," was injured while attempting to reach the top of a freight car. The evidence showed that the car in question was furnished with ladders at the ends, whilst other cars usually had ladders on the sides. The cars collided with the rear car of a number that had been switched onto the next track, but had not been drawn far enough from the switch-stand to clear the car on which plaintiff was. The night on which the accident took place was very dark. *Held*, that an instruction which attributed plaintiff's injuries to the position of the ladder which he was climbing, and to the darkness, was properly refused, when it ignored the fact that if plaintiff acted with proper care on his part, and the accident was due to the negligence of another employee which caused the car of plaintiff to be thrown onto a track which was not clear, the defendant would be liable.

Same—Contributory Negligence—Use of Rear Ladder.—Where the evidence shows that it is customary and proper for a car-catcher to use the ladder which he can first reach, an instruction that if there was a ladder on each end of the car it was the duty of the car-catcher to adopt the safer course of getting upon the rear ladder, and that if he did not do so he is guilty of contributory negligence, is properly refused.

Same—Permanent Injuries—Expectancy of Life—Carlisle Tables.—In Iowa the Carlisle tables are admissible, in an action for damages for permanent personal injuries, to show the plaintiff's expectancy of life.

Same—Measure of Damages—Expectation of Promotion.—The plaintiff's

expectation of promotion is too remote to be taken into consideration when it is not shown that he was qualified to receive promotion, or that he had any reason to expect promotion, and evidence of the earnings of persons occupying higher grades of employment, is improperly admitted.

APPEAL from District Court, Poweshiek County.

Action to recover damages sustained by plaintiff, a switchman in the defendant's employ, through the alleged negligence of the defendant. The jury having returned a verdict in favor of the plaintiff, and a motion for a new trial having been overruled, the defendant appeals.

S. K. Tracy for appellant.

Scott & Clute for appellee.

ROBINSON, J.—The plaintiff was employed by defendant in its yards at Cedar Rapids, in the business of switching cars. He received the injury of which he complains on the night of the 31st day of August, 1887, while engaged in the line of his duties. The switching crew of which he was a member consisted of the foreman, under whose directions the switching was done, the engineer and fireman, and plaintiff and another person, who were known as "car-catchers." In addition to these men there was an employee whose duty it was to throw the switches. It was the duty of the foreman to check the train, to cut off the cars, and to inform the switch-thrower as to the tracks on which he wished them placed. It was the duty of the car-catchers to ride the cars cut off by the foreman until their destination was reached, to prevent their doing damage, to couple them to other cars when necessary, and to notify the switch-thrower when the cars failed to clear other tracks. It was the business of the switch-thrower to throw the switches, under the direction of the foreman, to see that the cars thrown onto one track should clear all others, and, when the track upon which the foreman desired to switch a car was clear for that purpose, to give notice of that fact. At the time of the accident the car-catcher employed with plaintiff had taken charge of a "cut," and was engaged in making a coupling before the cars had ceased to move. A car was cut by the foreman, which it was the duty of plaintiff to ride. It was thrown onto a track next to the one where his companion was engaged in coupling, and plaintiff commenced climbing up the forward ladder to reach the top of the car. When he was part way up, his car collided with the rear car of the "cut" on the next track. This had not been thrown far enough from the switch to clear the car of plaintiff, and the result was that plaintiff was caught between the cars of the two cuts in such a manner that his right leg was broken and permanently disabled.

1. The plaintiff was injured while attempting to reach the top

of a car of the Chicago, Rock Island & Pacific R. Co. The evidence tends to show that all box cars of that company are furnished with ladders at the ends, while all similar cars of defendant have the ladders on the sides; also that the accident would have been less likely to happen in daylight. It is contended by appellant that the injuries to plaintiff resulted from the position of the ladder which he was climbing, or from the darkness, or from both causes combined; and that, since defendant was not responsible for either cause, it is not liable in this action, and that the court erred in refusing to give certain instructions to that effect. The instructions asked and refused ignore the fact that if plaintiff acted with proper care on his part, and the accident was due to the negligence of another employee, which caused the car of plaintiff to be thrown onto a track which was not clear, then defendant would be liable.

2. The defendant asked the court to give to the jury an instruction as follows: "If you find from the evidence that there was a ladder on each end of this car, then it was his duty to adopt the safer course in getting upon this car; and if he would have escaped injury by getting upon the rear ladder, then it was his duty to adopt the safer way of doing the work; and if he did not do so, and was injured in consequence thereof, then he cannot recover." The refusal of the court to give this instruction is assigned as error. The evidence did not warrant the giving of this instruction. It was not shown that there were two ladders in good order on the car in question. The plaintiff stated that there was no means of getting on the car excepting the one he used, and the evidence tended to show that it was customary and proper for the car-catcher to use the ladder which he could first reach. Certainly it cannot be said as a matter of law that it was his duty to inspect both ends of the car to ascertain where the ascent could be made with greatest safety, in view of the facts that the car was moving, that the night was dark, and that promptness of action on his part was necessary.

3. Appellant complains of the ruling of the court below which admitted in evidence the Carlisle tables, to show plaintiff's expectancy of life, and cites *Nelson v. Chicago, R. I. & P. R. Co.*, 38 Iowa, 564, and *Simonson v. Chicago, R. I. & P. R. Co.*, 49 Iowa, 88, in support of its position. But the case first named was overruled in *Knapp v. Sioux City & P. R. Co.*, 71 Iowa, 41, and the next case is not in conflict with the one last cited. The injury to plaintiff is shown to be permanent, and it was therefore proper to show his expectancy of life.

4. The district court permitted the plaintiff to show, against

the objections of defendant, that there was a line of promotion in the business in which he was engaged when injured; that the grade next to the one held by plaintiff was switch-thrower, without increase of pay; that the next grade was that of yard-master, with a salary of \$100 per month; and that the next was that of train-master, with a further increase of salary. Appellant complains of the admission of this evidence, and we think with sufficient cause. The plaintiff was receiving \$2.07 for each night's service, and was working every night. While it may be conceded that the evidence shows that plaintiff is unfitted to discharge the duties of the grades named by reason of his injuries, yet it does not show, nor tend to show, that he had any reason to expect promotion. Certainly it is not shown that he failed to receive it in consequence of his injuries. It is not shown that he was qualified to receive promotion. The damages which plaintiff sought to prove by the evidence in question were not pleaded, and were of a speculative and remote character. Counsel for appellee insist that the evidence was admissible, and cite *Belair v. Chicago & N. W. R. Co.*, 43 Iowa, 676, in support of their view. Some of the language of the opinion in that case gives color to their claim, but what was there said in regard to the matter now under consideration was at most in the nature of a *dictum*. Our conclusion in this case is in accordance with the ruling in *Brown v. Chicago, R. I. & P. R. Co.*, 64 Iowa, 656. See also *Brown v. Cummings*, 7 Allen (Mass.), 507. In cases like this it is proper to show the skill and capacity of the person injured, both before and after the injury was received, and any special damage of which the injury was the proximate cause; but it would be contrary to well-established and approved rules of law to permit the injured person to show in aggravation of damages that promotions are made, and wages increased, in the business in which he was engaged when injured, without at least showing that he was in the direct line of promotion. Whether he need show more than that is a question not involved in this case.

5. Other questions discussed by counsel are of such a nature as not to require further consideration, in consequence of the disposition we make of the case.

For the error pointed out the judgment of the district court is reversed.

Life Tables—Admissibility in Evidence.—See *Burlington, etc., R. Co. v. Coates*, 15 Am. & Eng. R. Cas. 265; *Scheffler v. Minneapolis, etc., R. Co.*, 19 lb. 173, and note 176.

LOUISVILLE, NEW ALBANY AND CHICAGO R. CO.

v.

BUCK.

(*Indiana Supreme Court, January 10, 1889.*)

Injuries Causing Death—Pleading—Averment of Damage.—In an action for negligently causing the death of one who left a widow and infant child, a general averment of damages, without averring actual pecuniary loss by those for whose benefit the suit is brought, is sufficient as against a demurrer to the complaint.

Same—Brakeman—Sunday Law.—An action to recover damages for the death of a brakeman which was caused by the negligent failure of the defendant to furnish safe and suitable appliances may be maintained notwithstanding the fact that the injury causing the death was received on Sunday, whilst the deceased was acting in violation of the Sunday law.

Same—Defective Appliances—Duty of Servant to Inspect.—Where a defect in a brake was not discoverable by the plaintiff, except by stooping down and looking under the car, such defect is not of so obvious a nature as to charge the brakeman with the assumption of risks arising from its use.

Same—Evidence—Declarations—Res Gestæ.—Declarations by an injured person made within two minutes of the accident, while he was being removed from under the wheels of the car which had passed over him, are admissible as part of the *res gestæ*.

APPEAL from Circuit Court, Benton County.

Action by James Buck, administrator, against the Louisville, New Albany & Chicago R. Co. to recover damages for negligently causing the death of plaintiff's intestate, George H. Bennett. A verdict was returned for the plaintiff, and the defendant appeals.

Geo. W. Easley, Geo. W. Friedley, and Geo. R. Eldridge for appellant.

E. P. Hammond, Wm. B. Austin, and Coffroth & Stuart for appellee.

MITCHELL, J.—Buck, as administrator of the estate of George H. Bennett, deceased, commenced suit against the Louisville, New Albany & Chicago R. Co. alleging that the company had wrongfully caused the death of the decedent, to the damage of his surviving widow and child. The complaint was in three paragraphs. It is charged in the first two paragraphs that the intestate was in the employ of the railway company as brakeman, and that he was fatally injured while uncoupling cars on account of dangerous and

defective appliances and machinery which the company negligently supplied. The same facts, substantially, were stated in the third paragraph, with the addition that the accident and fatal injury to the plaintiff's intestate were caused by the carelessness and negligent habits, and by the incompetency, of the engineer who had control of the engine at the time the accident happened, and that the incompetency and negligent habits of the engineer were known to the company and unknown to the intestate. No question is made as to the sufficiency of the complaint, except it is urged that it does not sufficiently appear by any averment therein that the widow or child of the decedent sustained damage in anywise on account of the defendant's negligence.

The averments in the complaint relevant to the point thus made are that Bennett was in the employment of the defendant as brakeman at the time of his death, and that he left surviving him, as his next of kin and only heirs, his widow, Fidella J. Bennett, and his daughter, Longretta May Bennett, both of whom are still living,—the latter being four years of age. It is also averred that "said administrator brings this action for the use and benefit of said widow and child, who, by reason of the death of said decedent, as aforesaid, have sustained damages in the sum of \$10,000.

For the appellant it is insisted that the general averment that the widow and child of the decedent had sustained damages in a specified sum was not sufficient, but that the pecuniary loss, either present or prospective, resulting to them from the intestate's death should have been specially pleaded.

Regan v. Chicago, M. & St. P. R. Co., 51 Wis. 599, is relied on to sustain the view thus contended for. General averment of damages sufficient.

Without pointing out the distinction between the case cited and that under examination in respect to the question involved, it is sufficient to say it appears in the complaint in the present case that the decedent was, at the time of his death, in the employ of the railroad company as a brakeman, and that he left a widow and one child four years old. It is an unavoidable inference, therefore, that he was in the vigor of manhood, and that he was at the time engaged in earning money for the support of his wife and child. *Kelley v. Chicago, M. & St. P. R. Co.*, 50 Wis. 381, 2 Am. & Eng. R. Cas. 65. Section 284, Rev. St. 1881, gives a right of action to the personal representative for the benefit of the widow and children or next of kin of one whose death has been caused by the wrongful act or omission of another, provided the former could have maintained an action against the latter had he lived. While there is some discord in the decisions of courts in respect to the right to maintain the action, even for nominal damages, without

averring and proving actual pecuniary loss by those for whose benefit the suit is brought, there can be no doubt but that, within the rule generally prevailing, the law will imply substantial pecuniary loss in some amount to the wife and child from the death of one who sustained the relation of husband and father to them, and who was at the time presumably receiving wages, and who was therefore possessed of the ability to discharge his obligation to support those dependent upon him. *Atchison, T. & S. F. R. Co. v. Weber*, 33 Kan. 543, 21 Am. & Eng. R. Cas. 418; *Houghkirk v. President*, 92 N. Y. 219; 1 *Shear. & R. Neg.* (4th Ed.) § 137.

Whatever the rule may require as applied to other cases, and in respect to the *quantum* or character of proof on the subject of pecuniary loss, there can be no doubt but that a general averment of damages in a case like the present is sufficient as against a demurrer to the complaint. It may be well to observe here, as applicable to this question, which is presented in another aspect later on in the record, that no precise rule for estimating the loss recoverable under the statute can be laid down. When the relation of the party whose death has been caused, to those for whose benefit the suit is being prosecuted, has been shown and his obligation, disposition, and ability to earn wages or conduct business, and to care for, support, advise, and protect those dependent upon him, the matter is then to be submitted to the judgment and sense of justice of the jury. *Board of Commissioners v. Legg*, 93 Ind. 523; *Tilley v. Hudson R. R. Co.*, 29 N. Y. 282; *Castello v. Landwehr*, 28 Wis. 522.

The jury returned a special verdict, which, so far as they are material to the questions for decision, exhibited the following facts: The deceased, a man about thirty years of age, in good health, and of industrious habits, was in the employment of the defendant railway company as brakeman on a freight train. On Sunday night, November 25, 1883, the train of which he was

**Facts found by
special verdict.**

one of the crew left Michigan City for La Fayette. Between 9 and 10 o'clock the train was stopped at the crossing of the Pan Handle R. for the purpose of taking on more cars. It was part of the duty of the decedent to couple and uncouple cars which were to be attached to or detached from the train. Soon after the train stopped, he went in between the engine and the car attached to it for the purpose of uncoupling the car from the engine. The car was loaded with lumber, and belonged to the defendant company, but the decedent had never seen it until after it was loaded, when starting from Michigan City. The reach-rod which, when properly adjusted, held the brake-beam in place, was, and had been for several days, absent from the brake-beam, in front of the wheels on the car next the engine. The absence of this rod was un-

known to the decedent, but the jury find that it was or might have been known to the defendant. Its absence caused the beam to hang lower and more forward than it otherwise would have done; but the fact that the rod was gone was not discoverable except by one stooping down and looking under the car. While attempting to uncouple the car, being for some reason unable to get the coupling-pin out of the draw-bar, the decedent held the pin up as far as he could get it, and then signalled the engineer to move the engine forward. The engineer obeyed the signal, but immediately and without warning reversed the lever, and threw the engine back, crowding the decedent against the car, and then again moved forward. While so crowded back, and before he could recover or extricate himself from his position, the decedent's feet were caught by the defectively attached brake-beam, and he was thrown under and run over by the car, which was moving forward. In this way he received injuries which are particularly described, and which resulted in his death the following morning. It was found that the decedent left a widow and child, as alleged in the complaint, and that they were damaged by his death in a specified sum. There was judgment for the plaintiff accordingly.

The appellant insists that the judgment ought to be reversed, and urges as one of the reasons that the jury found that the injury which resulted in the intestate's death was received on Sunday, while he was engaged at common labor in pursuance of a contract with the railway company, and that it was not made to appear that the work about which he was engaged was a work of necessity. Violation of Sunday law does not preclude recovery. We had occasion to consider this question in *Louisville, N. A. & C. R. Co. v. Frawley* 110 Ind. 18, 28 Am. & Eng. R. Cas. 308, where it was presented in substantially the same manner as in the present case. Our conclusion there was that a person injured by the negligent omission of another to perform a legal duty would not be denied a recovery, even though it appeared that the injured person was, at the time of receiving the injury, acting in disobedience of his collateral obligation to the state, which required of him the observance of the Sunday law. If the railway company violated its duty by furnishing machinery and appliances which it knew were defective, the danger to an employee who was required to use the appliances, in ignorance of their defective condition, was the same on one day as on another. That they were being used on Sunday rather than on Monday neither contributed to, nor was it the efficient cause of, the injury which gave rise to this action, nor can the railroad company now interfere and become the champion of the Sunday law as an excuse for its wrong, or to defeat a recovery. *Sutton v. Wauwatosa*, 29 Wis. 28. It is quite true that a plaintiff will

in no case be permitted to recover when it is necessary for him to prove his own illegal act or contract as a part of his cause of action, or when an essential element of his cause of action is his own violation of law,—*Holt v. Green*, 73 Pa. St. 198; *Coppell v. Hall*, 7 Wall. (U. S.) 558; *Steele v. Burkhardt*, 104 Mass. 59; *McGrath v. Merwin*, 112 Mass. 467,—but where he can prove his cause of action without proving that he was violating the law, even though it appears incidentally that he was at the time acting in disobedience of some statute, unless his illegal act was the efficient or proximate cause of the injury complained of, or unless the illegal act or contract is the foundation of his action, a recovery may be sustained nevertheless. *Cooley*, Torts (2d. Ed.), 178, 179.

Whoever travels about from place to place for the purpose of gaming with cards or otherwise, acts in violation of a criminal statute. It would hardly be claimed that a recovery against a common carrier would be denied if it appeared incidentally in evidence that a passenger injured through the carrier's negligence was travelling in violation of the statute against gaming. Why should a brakeman who is required to work in violation of the Sunday law be denied a recovery? The gist of the action in the present case is the negligent failure of the railway company to furnish safe and suitable appliances, whereby the death of the plaintiff's intestate was wrongfully caused while he was in the company's service as a brakeman. The contract of employment and the time when the injury occurred were mere incidents to, and were in no respect the foundation of, the action. *Louisville, N. A. & C. R. Co. v. Frawley*, *supra*; *Frost v. Plumb*, 13 Am. Law Reg. 537. It may be conceded that the decisions in some of the states are not all consistent with the conclusions above stated; but in our opinion these conclusions are in accord with the better view of the subject, and have the support of the weight of authority.

The defendant presented to the court 43 separate instructions, and asked that they be given the jury. Of these, 20 were given and the balance refused. The refusal to give these instructions is made the ground of complaint. It has frequently been ruled that where the jury has been required to return a special verdict, general instructions as to the law of the case are not proper. The court should explain to the jury distinctly what facts are material to be found within the issues, and give them such instructions as will enable them to find and settle the facts, so that the law may be applied to the facts found by the court. *Louisville, N. A. & C. R. Co. v. Frawley*, *supra*; *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 32 Am. & Eng. R. Cas. 488. Within this rule, an examination of the instructions given by the court

Special verdict
justifies a re-
covery.

leaves no doubt but that the jury were adequately directed in respect to the facts necessary to be covered by the special finding. Leaving out of view all of the facts found relating to the alleged negligence and incompetency of the engineer, and eliminating from the special verdict everything in the nature of conclusions of law, and it seems to us the facts found make a case justifying a recovery. They show that the railroad company failed in its obligation to supply its employee with safe and suitable appliances and machinery to do the work required of him, and that it required him to use machinery which it knew to be defective. This established the company's negligence. The special verdict also shows that the defect in the machinery was unknown to the decedent; that it was not obvious, and could not have been discovered except by stooping down and looking under the car. This showed that the employee was not guilty of contributory negligence in going in between the cars to uncouple them, notwithstanding the defective condition of the appliances.

It is settled beyond controversy that railroad employees are presumed to understand the nature and hazards of the employment when they engage in the service, and that they assume all the ordinary risks and obvious perils incident thereto. Such risks are presumably within the employee's contract of service. *Jenny Electric Light, etc., Co. v. Murphy*, 115 Ind. 566 (present term). This does not mean, however, that the latter may not repose confidence in the prudence and caution of the employer, and rest on the presumption that he has also discharged his duty by supplying machinery free from latent defects which expose the employee to extraordinary and hidden perils. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Hough v. Texas & P. R. Co.*, 100 U. S. 213. While the employer may expect that an employee will be vigilant to observe, and that he will be on the alert to avoid, all known and obvious perils, even though they may arise from defective tools and machinery (*Atlas Engine Works v. Randall*, 100 Ind. 293), yet the latter is not bound to search for defects, or inspect the appliances furnished him to see whether or not there are latent imperfections in or about them which render their use more hazardous. These are duties of the master, and unless the defects are such as to be obvious to any one giving attention to the duties of the occasion, the employee has a right to assume that the employer has performed his duty in respect to the implements and machinery furnished. *Bradbury v. Goodwin*, 108 Ind. 286; *Little Rock, M. R. & T. R. Co. v. Leverett*, 48 Ark. 333, 28 Am. & Eng. R. Cas. 459; *Fort Wayne, J. & S. R. Co. v. Gildersleeve*, 33 Mich. 133; *Hughes v. Winona & St. P. R. Co.*, 27 Minn. 137; *Wood, Mast. & Serv.* § 376.

Risks assumed
by employees
—Latent defects.

The facts found, very clearly furnish a basis for the application of the foregoing principles; and these principles, when applied to the facts found, sustain the judgment of the court upon the special verdict. Many of the instructions asked would, if they had been given, necessarily have required the jury to return very much of the evidence as part of their special verdict, while others would have required the statement of mere conclusions which the jury could not properly draw. For example, in one of the instructions the court was asked to require the jury to find what was the proximate cause of the death of Bennett. In another, the court was asked to require the jury to describe in their verdict the appliances attached to the car for the purpose of breaking it. The facts showing the manner in which the accident and injury occurred, and the condition of the car and the appliances attached having been particularly found and set out in the special verdict, it became a question for the court to determine whether or not the intestate's death was proximately caused by the negligent omission of duty on the part of the railroad company. We are unable to perceive how the court would have been aided in arriving at a correct conclusion if the jury had been required to describe the appliances in their verdict. The material facts in that connection were that there inhered in the appliances a hidden or latent defect, which increased the ordinary and obvious perils of the service in which the intestate was engaged, and which made them an efficient agency in producing the fatal injury.

We have examined the other instructions asked and refused, and, without commenting upon them in detail, we need only say the court committed no error in refusing them.

It is contended that the court erred in overruling a motion made by the appellant for a *venire de novo*. In this we do not

concur. It must now be accepted as settled that a special verdict will not be considered as so uncertain, ambiguous, or defective as that no judgment can be rendered thereon, because some of the issues in the

case are not affirmatively or expressly settled or determined thereon one way or the other. If the verdict is silent concerning any of the facts in issue, the court will assume, upon a motion such as that under consideration, that the party upon whom rested the burden of proof in respect to those facts failed to prove them. If the failure to find the facts was contrary to the evidence, it may furnish a sufficient reason for a new trial; but the failure does not render the special verdict objectionable, nor does it afford any ground for a *venire de novo*. *Glantz v. City of South Bend*, 106 Ind. 305; *Deeter v. Sellers*, 102 Ind. 458. *Mitchell v. Colglazier*, 106 Ind. 464.

It may be conceded that there are some merely evidentiary

Sufficiency of
special ver-
dict.

facts found in the special verdict, and that it also embraces many statements which are essentially conclusions of law. Notwithstanding all this, it seems clear to us that, stripped of all these, the verdict is yet sufficient to lead up to and support the judgment, and that the motion cannot be successfully urged on that account.

Questions are made and discussed concerning the propriety of rulings of the court in admitting evidence tending to show that the engineer who had the engine in charge at the time the decedent was injured was negligent and incompetent. According to our view of the case, there was no reversible error in any of these rulings, for the reason that the special verdict sustains the judgment, even though all the facts pertaining to the competency or conduct of the engineer be eliminated from the case. While we have discovered no error in the rulings, we do not regard them of sufficient materiality to justify us in prolonging the opinion by setting them out separately and examining them in detail.

The only other question which requires consideration relates to the ruling of the court in admitting in evidence certain declarations of the decedent which were made immediately after he was injured, and substantially while he was being extricated from under the wheels of the car which had passed over him. The conductor of the train testified that he was on the caboose when he received notice that the decedent was hurt, and that he immediately ran forward and found him under the rear end of the second car from the engine. The following is the testimony of the conductor upon which the objection is predicated; "When I took him out I asked him, 'How did this happen?' He told me that he was uncoupling the engine from the first car, but could not get the pin clear out of the draw-bar, and had to hold it up, and hallooed to the engineer to go ahead. He started, and by some cause 'threw the engine over' and came back against him before he could get out, and crowded him back against the car; and the brake-beam, catching his leg, pulled him down, and the cars ran over him." It is not always easy to determine when declarations having relation to an act or transaction should be received as part of the *res gestæ*, and much difficulty has been experienced in the effort to formulate general rules applicable to the subject. This much may, however, be safely said, that declarations which are the natural emanations or outgrowths of the act or occurrence in litigation, although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as necessarily to ex-

Declarations
of deceased—
Res gestæ.

clude the idea of design or deliberation, must, upon the clearest principles of justice, be admissible as part of the act or transaction itself. *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185; *Lund v. Inhabitants of Tynesborough*, 9 Cush. (Mass.) 41; *Com. v. McPike*, 3 Cush. (Mass.) 181; *Augusta Factory v. Barnes*, 72 Ga. 217; *Travelers Insurance Co. v. Mosley*, 8 Wall. (U. S.) 397; *People v. Simpson*, 48 Mich. 474; *Keyser v. Chicago & G. T. R. Co. (Mich.)*, 33 N. W. Rep. 867; *Kirby v. Com.*, 77 Va. 681; *City of Galveston v. Barbour*, 62 Tex. 172, 8 Am. & Eng. Corp. Cas. 577; *State v. Horan*, 32 Minn. 393; *Little Rock, M. R. & T. R. Co. v. Leverett*, *supra*; *State v. Ah Lois*, 5 Nev. 99; *Railroad Co. v. Coyle*, 55 Pa. St. 396-402; *Durkee v. Central Pac. R. Co.*, 69 Cal. 533; *Lambert v. People*, 29 Mich. 71; *Hill's Case*, 2 Gratt. (Va.) 594; *Jordan's Case*, 25 Gratt. (Va.) 945; *Harriman v. Stowe*, 57 Mo. 97; *Entwhistle v. Feighner*, 60 Mo. 215; *Elkins v. McKean*, 79 Pa. St. 501; *Hart v. Powell*, 18 Ga. 639; *Driscoll v. People*, 47 Mich. 413; *Casey v. New York C. & H. R. Co.*, 78 N. Y. 518; *McLeod v. Ginther*, 80 Ky. 399, 15 Am. & Eng. R. Cas. 291; 1 Whart. Ev. §§ 258-67. Any other rule would in many instances operate to defeat the accomplishment of justice by excluding evidence of the most trustworthy character. While some of the cases cited above carry the doctrine to its extremest length, they all illustrate and apply the general principles consistent with the conclusions we have heretofore enunciated. The declarations under consideration were made within not to exceed two minutes of the occurrence, while the declarant remained in the presence of the train and the alleged defective machinery which was instrumental in producing his hurt, and before he had been removed from the spot where he received his fatal injury. The surrounding circumstances in the presence of which the declarations were uttered were therefore silent witnesses in corroboration of his statement. This taken into connection with the condition of the decedent, who was suffering under the shock of an injury from which he died in about six hours afterwards, necessarily excludes the idea of calculation or ability to manufacture evidence for future purposes. The court committed no error in admitting the evidence.

There are a number of incidental questions of minor importance presented and discussed by counsel, but, so far as they are material to the case as we have felt constrained to consider it, they have all been disposed of by what has preceded.

Without entering upon a detailed examination of the evidence which tends to support the verdict, we content ourselves with saying that, while some of the criticisms of counsel seem plausible, and carry with them much force, we are nevertheless constrained to hold, since there was some evidence which the court and jury, whose duty it was to judge of its weight and credibility,

accepted as sufficient, that the judgment cannot now be disturbed.

The judgment is therefore affirmed, with costs.

Right of Employees Injured on Sunday to Recover Damages.—It is the general rule that a railway company cannot avail itself of a Sunday law as a defence to an action against it by an injured employee. *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 28 Am. & Eng. R. Cas. 308, citing *Patterson*, Railw. Acc. L. pp. 64, 65, and note; *Beach*, Cont. Neg. pp. 186, 187, 270, 278; *Cooley*, Torts, p. 155; 21 Cent. L. J. 525; *Mohney v. Cook*, 26 Pa. 342; *Phila.*, etc., R. Co. v. *Phila. & H. De G. S. T. Co.*, 23 How. 209; *Schmid v. Humphrey*, 48 Iowa, 652; *Knowlton v. Milwaukee*, etc., R. Co., 59 Wis. 278; *Wood*, Ry. L. § 318; *Wentworth v. Jefferson*, 60 N. H. 158; *Opsahl v. Judd*, 30 Minn. 126; *Carroll v. Staten I. R. Co.*, 58 N. Y. 126; *Platz v. Cohoes*, 89 N. Y. 219; *Stewart v. Davis*, 31 Ark. 518, 25 Am. Rep. 576; *Baldwin v. Barney*, 12 R. I. 392; *Johnson v. Missouri Pac. R. Co.*, 18 Neb. 690, 23 Am. & Eng. R. Cas. 429, and see note, 23 Am. & Eng. R. Cas. 434. In Massachusetts, however, it is held that an engineer on a locomotive engine, who was performing the ordinary duties of his employment on Sunday, is laboring in violation of the Mass. Pub. Stats., c. 98, § 2, unless the running of the train on which he is employed is a work of necessity or charity; and if it is not, and while so laboring he is injured by a defect in the railroad track, his illegal act necessarily contributes to cause his injury and precludes his maintaining an action therefor. *Read v. Boston & A. R. Co.*, 140 Mass. 199.

Injuries to Servants—Brakeman—Rules—Defective Appliances.—Plaintiff, a brakeman, went between a standing and a moving car to couple them. He tried to take the link from the standing car but found it fast. The draw-head was one and a half or two inches lower than it should have been and twisted to one side. While the ordinary play of a link is from six to seven inches, he could not couple with this link without raising it up with extra force. He took the link from the approaching car, seized the link in the standing car, tried to raise it up, and his hand was caught and injured. By the rules of the company, brakemen were forbidden to go between the cars to make a coupling "unless the draw-heads and other coupling appliances were known to be in good order." *Held*, that as plaintiff was chargeable with knowledge of the defective condition of the draw-head and link, and violated the rules in attempting to make the coupling, he was guilty of gross contributory negligence, and could not recover. *St. Louis, I. M. & S. R. Co. v. Rice* (Ark.), 11 S. W. Rep. 699.

Same—Rules—Uncoupling Moving Cars.—A brakeman stepped between stationary cars to uncouple them, and remained there attempting to do so after they were wrongfully started; he was pushed into a cattle-guard which he had knowledge of, and was injured. He testified that he was so absorbed in attempting to uncouple the cars that he forgot the existence of the cattle-guard, and that, knowing that the starting of a train sometimes loosens a tight car-pin, he attempted to remove the pin after the train started. He admitted that, but for having continued his attempt, he would have escaped injury. *Held*, that, as brakemen were by the rules of the company forbidden to uncouple cars while in motion, he was guilty of contributory negligence which precluded a recovery. *Sedgwick v. Illinois Cent. R. Co.* (Iowa), 41 N. W. Rep. 35.

Same—Use of Coupling-stick—Knowledge of Rules.—The rules of a company required that in coupling cars the coupling-stick should be used. A brakeman attempted to couple the first section of a freight train to the engine without the use of the stick. The rear section of a train ran down

grade, struck the first section, and plaintiff was injured. The testimony as to defendant's negligence, and plaintiff's knowledge of the rule requiring the use of the coupling-stick, was conflicting. *Held*, that the question of the plaintiff's contributory negligence was properly submitted to the jury, and that the court properly refused to instruct the jury that, if plaintiff disobeyed the company's rules, he could not recover unless the injury was caused by the defendant's wanton negligence. *Held*, also, that the court properly refused to withdraw from the jury all inquiry as to plaintiff's knowledge or notice of the existence of the rule forbidding the coupling of cars without the use of a stick. *Louisville & N. R. Co. v. Perry* (Ala.), 6 S. Rep. 40.

Same—Dangerous Position—Province of Jury.—In an action against a railroad company to recover damages for personal injuries, it appeared that a brakeman was engaged in the duties of switching and coupling cars ahead of an ordinary freight-engine that was being used for switching-purposes in one of the yards of the company, a switch-engine never having been prepared for use in that yard. Having made a coupling ahead of the engine to a box-car, another brakeman being placed on the box-car, and, as the engine moved forward to some loaded coal-cars ahead, he took a position on the platform to which the pilot is attached, immediately in front of the boiler-head, and behind the pilot-beam. The engine was driven with such speed against the loaded coal-cars as to inflict injuries that caused his death. *Held*, that the questions as to whether that position was one of danger, and voluntarily chosen by the deceased, and whether it was the usual custom of all brakemen in that yard, and in all other yards on that road, to ride on the pilot, are questions of fact to be determined by the jury under all the circumstances. It is only when it clearly appears, and the facts are undisputed, that the injured employee has voluntarily chosen a dangerous position, a safer one having been provided by the company, that the court can say as a matter of law that the selection was such contributory negligence as would defeat a recovery. *Missouri Pac. R. Co. v. McCally* (Kan.), 21 Pac. Rep. 574.

Same—Dangerous Premises—Knowledge of Servant.—The plaintiff, in an action for personal injuries, was a car-coupler in one of defendant's yards. The yard was from three quarters of a mile to a mile in length, and about one quarter of a mile wide, and contained 10 or 11 tracks substantially parallel to each other. He had been employed about six months in the yard at the time when he received the injuries complained of. There was a gutter or ditch between two of the tracks, which defendant alleged was necessary for the purpose of drainage. Plaintiff alleged that, in consequence of holes or depressions in the bottom of this gutter, or in consequence of the declination of the land near the track and the centre of this gutter, that the side of the gutter was unsuitable for a firm foothold, and that, while he was standing outside of the line of the cars endeavoring to signal the engineer to suspend operations for the reason that he had not succeeded in coupling the cars, he stepped down into a depression or into this ditch with his left foot, his foot at the same time slipping from the end of the ties on which he stood, and fell, and was injured by the moving cars. He had been employed as a car-coupler in the same yard some years before, and had worked for the defendant in other capacities more recently, but had only been occasionally present in that part of the yard. He had occasionally passed the gutter and had thus had opportunities of seeing it. He testified that he did not know that there was a gutter there, and that he did not know there were any depressions or places some of which were lower than others at this place. *Held*, that there was sufficient evidence to support a finding that the plaintiff had no knowledge of the gutter, and that a verdict in his favor would not be reversed

on the ground of contributory negligence. *Harr v. New York Cent. & H. R. R. Co.* (N. Y.), 21 N. E. Rep. 425.

Same—Switchman—Walking on Track.—A railroad switchman, while running upon the track at station grounds when he might, but with some inconvenience, have been outside the track, was overtaken and injured by a locomotive which was moved without the customary signal. *Held*, to present a proper question for the jury whether he was chargeable with contributory negligence. *Sobieski v. St. Paul & D. R. Co.* (Minn.), 42 N. W. Rep. 863.

Same—Coupling Cars—Dangerous Speed—Contributory Negligence.—Plaintiff, who was the only brakeman on a freight train, removed the coupling-pin from the engine-coupling and signalled the engineer to back, and, when the cars would run onto a side track, he went on top of one of them and proceeded to the rear end of the last car, where he descended to the ground and ran to a standing car for the purpose of coupling it to the others. He succeeded in making the coupling but was struck by the moving car and thrown to the ground, run over, and injured. He claimed that he coupled the car in obedience to the direction of the conductor; that it was the custom for the conductor, when there was but one brakeman upon the train, to go upon the moving cars, and by applying the brakes reduce their speed so that the coupling could be made in safety, and that, when the conductor gave him the order to make the coupling in question, he indicated by his actions that he would follow him onto the cars for that purpose, and that he neglected to do so. At the time the coupling was made the cars were moving at the rate of four and a half miles an hour. Plaintiff testified that when he reached the top of the car the conductor was by the side of the car with his hand on the ladder, and was apparently about to follow him. He also testified that when he descended from the car he did not notice that the conductor had not gone upon them, and that from the time he reached the ground until he was struck and thrown down his attention was given to the coupling, and that he did not notice that the speed of the cars had not been reduced. *Held*, that, notwithstanding the fact that plaintiff by looking back could have seen that the conductor had not gone upon the cars and that the speed had not been reduced, it could not be said as a matter of law that he was guilty of contributory negligence. *Held*, also, that the question whether the rate of speed was dangerous was in the nature of a conclusion to be drawn from the facts proven, and was for the determination of the jury. *Henry v. Sioux City & P. R. Co.* (Iowa), 39 N. W. Rep. 193. The court said:

"It is true that by a glance to the rear when he was about to descend from the cars he could have seen that the conductor had not gone on top of them, and that, if he had noticed the cars as they approached him, he might have seen that their speed had not been reduced; but if it was the duty of the conductor to go upon the cars and apply the brakes, and he had been led by his conduct to believe that he was about to perform that duty, he was not necessarily negligent because he proceeded to do the work assigned to him without first ascertaining whether he had performed it. *Beems v. Chicago, R. I. & Pac. R. Co.*, 58 Iowa, 150, 6 Am. & Eng. R. Cas. 222. The facts as testified by plaintiff do not bring the case within *Nichols v. Chicago, R. I. & P. R. Co.*, 69 Iowa, 156. In that case the evidence of the plaintiff showed without any doubt that he knew when he went between the cars that his signal to reduce the speed had not been understood or was being disregarded. And the court instructed the jury that, if he knew that fact, or by the exercise of reasonable diligence might have known it, he could not recover. While we approved that instruction, we held that the verdict could only have been arrived at

by totally disregarding it. But there was no claim, as there is in this case, that plaintiff had been led to relax that diligence in the matter which otherwise would have been required of him by the conduct of the co-employee whose duty it was to slacken the speed of the cars."

Same—Coupling Cars—Dangerous Construction—Incompetent Engineer.—In an action to recover damages for personal injuries sustained by a yardman in the defendant's employ, the plaintiff based his claim on the ground that the car was so constructed as to be specially dangerous to persons attempting to couple it, and also that the engineer was incompetent, reckless, and guilty of negligence. The evidence showed that the car in question was one of the U. S. rolling-stock cars, and its bumpers or deadwoods were so constructed as to greatly enhance the danger of injury to the person coupling. It appeared that these cars were very little used in the west, but that they were used on some eastern roads. Plaintiff testified that this was the first car of the kind that he had seen while in the defendant's service, whilst defendant's evidence was to the effect that all roads carried a greater or less number of the cars. Plaintiff offered evidence showing that the engineer had been suspended for carelessness in allowing an incompetent person not an employee to run his engine through the yard, whereby an accident resulted, and that he bore the reputation of being reckless and rough in the handling of cars. For defendant a number of witnesses testified that the engineer was competent. The accident was caused by the engineer reversing the engine whilst plaintiff was coupling a car which had become detached whilst the train was running at about ten miles an hour. It was shown that it was unnecessary, and contrary to the custom of careful engineers, to check the train in the manner adopted by the engineer. The testimony of the engineer was to the effect that he did not reverse the engine, and that the train was running at a rate of only five or six miles an hour. Plaintiff did not know what engineer was in charge of the train, and could not, owing to a curve, see the engine when he discovered that the car was uncoupled. *Held*, that the evidence was sufficient to send the case to the jury, and that instructions in the nature of a demurrer to the evidence were properly refused. *Held*, also, that the defendant had no cause to complain of instructions that before the jury could return a verdict for the plaintiff they must find that he was not injured by his own negligence that the engineer in charge of the locomotive was incompetent, of which fact the defendant had notice, and that such engineer was guilty of an act of negligence in reversing his engine without warning, and throwing the car suddenly and violently backward whilst plaintiff was making the coupling. *O'Hare v. Chicago & A. R. Co. (Mo.)*, 9 S. W. Rep. 23.

Same—Contributory Negligence—Instructions.—In an action to recover damages for negligently killing plaintiff's husband, defendant has no cause to complain of an instruction that "if the defendant failed to exercise such care and diligence in view of the actual situation as disclosed by the evidence, and such negligence occasioned the accident or contributed to produce it, and Mr. Nash was without fault, his wife would be entitled to recover the full value of his life" when the court immediately thereafter instructed the jury, in terms of §§ 2972, 3034 of the Georgia Code, that if the plaintiff by ordinary care could have avoided the consequences to himself of defendant's negligence he is not entitled to recover, and that no person shall recover damages from a railroad company for an injury to himself or his property where the same is done by his consent or is caused by his negligence. *Central R. & B. Co. v. Nash (Ga.)*, 7 S. E. Rep. 808.

CINCINNATI, HAMILTON AND DAYTON R. CO.

v.

MCMULLEN.

(Indiana Supreme Court, February 21, 1889.)

Injuries Causing Death—Right of Action—Jurisdiction.—Actions for personal injuries are transitory in their character, and, notwithstanding the death of the person injured, may be brought in a state other than that in which the accident occurred, provided the right accrued in the latter state under a statute similar in import and character to the one in force in the jurisdiction in which the suit is brought.

Fellow-servants—Car Inspector—Conductor—Defective Appliances.—A car inspector, upon whom is enjoined the duty of inspecting the company's cars, is not a fellow-servant of a conductor, and the company is liable to the latter for injuries sustained through the failure of the former to detect defective appliances.

Negligence—Inspection of Cars—Instructions.—An instruction that the jury may find for the plaintiff, if the company was negligent in inspecting cars received from another company, and the deceased was himself free from fault and negligence in the use of the appliances, is not open to the objection that it authorizes a verdict for the plaintiff upon proof of the negligence of the company or its agents, without showing that the deceased was exercising due care.

Same—Conductor of Freight Train—Duty to Inspect Cars.—There is no legal assumption that it is the duty of the conductor of a freight train to inspect the cars, or that he is chargeable with negligence for using unsafe cars, if the defect was such that it might have been discovered by inspection, and the court cannot charge, as matter of law, that the deceased, being at the time he was injured the conductor of a freight train, and not under the immediate control of a superior, was held to ordinary and reasonable care in the inspection of the cars, etc.

Same—Evidence—Instruction—Province of Jury.—In an action for damages for negligently causing the death of plaintiff's intestate, an instruction that the mere fact that the deceased was found dead upon the defendant's track, and that it was afterwards discovered that the brake-staff on one of the cars which was part of his train had no brake-wheel upon it, and that a brake-wheel was found near deceased, is not sufficient to show that his death was caused by any defect in the brake-staff or wheel, infringing upon the province of the jury and is properly refused.

Same—Duty of Conductor—Inspection—Rule of Company—Evidence.—A rule or general direction requiring freight conductor to inspect the coupling, brakes, etc., connected with his train, and making him responsible for their condition, presumably exists in writing, and parol testimony thereof is inadmissible in an action by a conductor to recover damages for injuries sustained by reason of defective appliances.

APPEAL from Circuit Court, Wayne County.

Action by Dominick McMullen, administrator, against the Cincinnati, Hamilton & Dayton R. Co., to recover damages

for negligence causing the death of plaintiff's intestate, Stephen Wiggins. The defendant appeals from a judgment for the plaintiff.

R. D. Marshall and H. C. Fox for appellant.

C. H. Burchenal and John L. Rupe for appellee.

MITCHELL, J.—McMullen, as administrator of the estate of Stephen Wiggins, deceased, brought this action against the railroad company above named to recover the pecuniary loss resulting to the wife and children of the decedent, whose death is alleged to have been wrongfully caused by the neglect of the company.

It appears from the complaint that the intestate was a conductor on one of the railroad company's freight trains, and that his death was caused on the 3d day of February, 1885, in the city of Cincinnati, Ohio, by reason of the defective and dangerous condition of a brake on one of the company's cars. A statute of the state of Ohio, giving a right of action, to be prosecuted in the name of the personal representative for the benefit of the wife or husband and children, wherever the death of a person has been caused by the wrongful act, neglect, or default of another, is incorporated in the complaint. This statute is in no material respect variant from the one covering the same subject, as found in section 284, Rev. St. 1881.

An elaborate argument is submitted in support of the proposition that actions like the present, which were unknown to the common law, and are wholly of statutory origin, can only be maintained within the jurisdiction in which the right of action accrued. Hence it is contended the injury and death having occurred in the state of Ohio, and the

right of action, if any existed, having been given by the statute of that state, the courts of Indiana are without jurisdiction to enforce the statute of the former state. Since the appeal was taken in the present case, this court has decided the question thus presented adversely to the view contended for by the appellant. *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169. We arrived at the conclusion in the case cited that actions for the recovery of damages for personal injuries or for pecuniary loss are transitory in character, and arise out of the supposed violation of rights which in legal contemplation are neither local, nor confined to the state where the right accrued. The further conclusion was arrived at that according to the weight of authority as well as upon principle, the jurisdiction of courts to entertain actions or enforce rights which accrued in a foreign state did not depend upon whether the right sought to be enforced was of statutory or of common-law origin, provided the right accrued under a statute similar in import and character to

one in force in the jurisdiction in which the remedy was sought. Adhering to the conclusions there stated, it follows that the action was well brought in the court below.

The plaintiff's case proceeded upon the theory that his intestate's death was caused by the negligence of the railroad company in allowing one of its cars with a defective brake to be put into a train at Richmond, Ind., of which the intestate was put in charge as conductor. There was evidence tending to show that the latter went upon the car in the company's yard at Cincinnati, the brakeman being necessarily otherwise engaged at the time, and, while attempting to control the movement of the car by the use of the brake, the handle to that appliance suddenly gave way, or slipped off; thereby causing the decedent to lose his balance, and fall between the moving cars, one of which passed over his body, crushing him to death.

The theory of the appellate company was that, if the intestate's death was occasioned by the negligence of any one, it was the fault of the car-inspector at Richmond, Ind., where the train was made up, and that the car-inspector was a co-employee with the plaintiff's intestate. Hence the insistence is, there can be no recovery, upon the principle that an employer is not liable to an employee for an injury occasioned by the negligence of a co-employee, while both are engaged in a common service. The instructions of the court relevant to that feature of the case were adverse to the appellant's view, and they are now made the subject of complaint. That one who engages in the service of a railroad company is presumed to be acquainted with, and to take upon himself all the ordinary risks incident to, the service, including the risks arising from the negligent conduct of co-employees in whose selection and retention proper care has been exercised, is too well settled to admit of further discussion. It is also a well-established rule that all those who are subject to the same general control, and are co-operating in the prosecution or accomplishment of the same general end and purpose, are, while engaged in the common pursuit, without regard to their relative rank, co-employees. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Atlas Engine-Works v. Randall*, Id. 293; *Gormley v. Ohio & M. R. Co.*, 72 Ind. 31, 5 Am. & Eng. R. Cas. 581; *Brazil & C. Coal Co. v. Cain*, 98 Ind. 282.

Liability of company for act of co-employee.

It is, however, the duty of a railroad company to provide and maintain reasonably safe and suitable cars and other appliances for its employees to work with, and it cannot escape liability to an employee who, without fault or neglect on his part, suffers injury from the use of defective appliances or implements by showing that the failure to discover and amend the defect was attributable to the neglect

Duty of employer as to cars and appliances.

of an agent of the company to whom the duty of selecting and inspecting its cars and their appendages had been committed. An employee is required to observe and avoid all known or obvious perils, even though they may arise from defective machinery and appliances, but he is not bound to search for defects, or make a critical inspection of the appliances which are provided for his use. These are duties of the employer, who is required, not only to furnish reasonably safe and suitable tools and machinery, but to exercise such a continuing supervision over them, by such reasonably careful and skilful inspection and repair, as will keep the implements which employees are required to use in such a condition as not unnecessarily to expose them to unknown and extraordinary hazards. *Louisville, N. A. & C. R. Co. v. Buck*, 116 Ind. 566, *ante*, p. (present term), and cases cited.

Whoever is appointed or permitted to discharge duties which pertain to the station or function of employer, must, upon the plainest principles of reason and justice, be held to stand as the representative of the employer, and, in case injury results from his neglect, the latter must answer for his delinquency. When the premise is conceded that the duty to furnish reasonably safe

Car inspector
not co-em-
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brakeman.

and proper instrumentalities for the performance of the work required rests upon the employer, the conclusion logically follows that the consequences of a negligent failure to perform that duty must, no matter to whom it may have been committed, be visited upon the employer, and not upon the employee who suffered injury therefrom. It cannot be said that a car-inspector in the employment of a railroad company, upon whom is enjoined the duty of inspecting the company's cars, is a co-employee of a brakeman, or of one who is in the line of his service discharging the duties of brakeman, within the meaning of the common-law rule which exempts a master from liability for injuries to a servant resulting from the negligence of a fellow-servant. *Bushby v. New York, L. E. & W. R. Co.*, 107 N. Y. 374; *Fay v. Minneapolis & St. L. R. Co.*, 30 Minn. 231, 11 Am. & Eng. R. Cas. 193; *Macy v. St. Paul and D. R. Co.*, 35 Minn. 200; *Condon v. Missouri Pac. R. Co.*, 78 Mo. 567, 17 Am. & Eng. R. Cas. 583; *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 58; *King v. Ohio, etc., R. Co.*, 14 Fed. Rep. 277; *Brann v. Chicago, R. I. & P. R. Co.*, 53 Iowa, 595.

After a careful examination of the authorities, the rule applicable to the point under consideration was well stated in *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 24 Am. & Eng. R. Cas. 407, in the following language: "If no one was appointed by the company to look after the condition of the cars, and see

that the machinery and appliances used to move and to stop them were kept in repair and in good working order, its liability for the injuries would not be the subject of contention. Its negligence in that case would have been in the highest degree culpable. If, however, one was appointed by it charged with that duty, and the injuries resulted from his negligence in its performance, the company is liable. He was, so far as that duty is concerned, the representative of the company. His negligence was its negligence." As applied to the cars and instrumentalities furnished by the railroad company itself, the rule thus enunciated meets our approval.

In respect to cars received by one railroad company from another in the course of transportation, since the duty of the receiving company is to receive and forward the cars over its road, the rule above enunciated is not applicable in its strictness. In such a case it may be said with much plausibility that it is not the duty of the company to furnish appliances and instrumentalities, but to make proper inspection, and give notice of defects, if any are found, and that this duty is performed by the employment of a sufficient number of competent and skilful inspectors, who are subjected to proper rules and instructions. In cases of that class it has been held that inspectors of cars and those acting as brakemen were fellow-servants, within the common-law rule. *Mackin v. Boston & A. R. Co.*, 135 Mass. 201, 15 Am. & Eng. R. Cas. 196; *Keith v. New Haven & N. R. Co.*, 140 Mass. 175, 23 Am. & Eng. R. Cas. 421; *Smith v. Flint & P. M. R. Co.*, 46 Mich. 258; *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318, 17 Am. & Eng. S. Cas. 578.

Inspection of cars received from another company.

The instructions complained of predicate the right of recovery upon the condition that the jury find the company negligent in the performance of its duty in the respects we have been considering, and upon the further condition that they find that the decedent was "himself free from fault and negligence in the use of such appliances." The contention that, under the instructions complained of, the plaintiff was entitled to recover by showing that the railroad company or its agents were negligent, without showing that the decedent was exercising due care, is not well founded. We agree that it was incumbent upon the plaintiff to aver and prove the negligence of the railroad company, and the absence of contributory negligence on the part of the intestate, and that the burden of proof was upon the plaintiff upon both these propositions. An examination of the instructions demonstrates that the case was fairly put to the jury upon that theory.

Burden of proof.

It is contended that the charge of the court relating to the

measure of damages is much too broad. There is force in some of the objections thus urged, but, while we do not approve of the instruction in the broad interpretation which might be given it, we are nevertheless constrained to hold that, taking it all together, it was capable of such a construction as expressed the proper rule of damages, and that the amount assessed by the jury does not indicate that they were misled by the charge. *Louisville, N. A. & C. R. Co. v. Buck, supra.* Complaint of a general character is made concerning the giving of other instructions by the court, but an examination of the charges complained of fails to disclose anything objectionable in them.

It was not error for the court to refuse to instruct the jury, as requested, to the effect that, the decedent being at the time he was injured the conductor of a freight train, and not under the immediate control of a superior, that he was therefore the representative of the company, and held to ordinary and reasonable care, not only in the management of the train, but in the inspection of the cars, machinery, brakes, and the like. As is correctly stated in the head-note to *Ransier v. Minneapolis & St. L. R. Co.*, 32 Minn. 331, 11 Am. & Eng. R. Cas. 647, there is no legal presumption that it is the duty of the conductor of a railway freight train to inspect the cars and machinery of his train, or that he is chargeable with negligence for using unsafe cars, if the defect was such that it might have been discovered by inspection. This being so, the proposition involved in the instruction asked could not be stated as matter of law.

In like manner, the court ruled correctly in refusing the fourteenth instruction asked by the appellant, which was to the effect that the mere fact that the deceased was found dead upon the defendant's railroad track, and that it was afterwards discovered that the brake-staff on one of the cars which was part of his train had no brake-wheel upon it, and that a brake-wheel was found near the deceased, was not sufficient to show that his death was caused by any defect in the brake-staff or wheel. It was not the province of the court to say, as matter of law, what facts and circumstances were sufficient to show that the death of the intestate was caused by defective machinery. While it is true, as we have seen, the burden was on the plaintiff to prove that the defendant was negligent in that it supplied defective machinery, and that the intestate was free from fault contributing to his death, it was not necessary to make the proof by direct evidence. The verdict will be upheld if these facts are made to affirmatively appear, either directly or circumstantially. If, from all the facts and circumstances proven in the case, the

Measure of
damages.

Conductor of
freight train
not bound to
inspect cars.

Evidence as
to defects
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dent.

inference arises that the deceased was at the time exercising proper caution, and that his death was caused while he was using a defective brake on one of the appellant's cars, then a recovery was justified, even though there was no direct evidence given by persons who saw the deceased at the moment he fell under the car. *Indiana, B. & W. R. Co. v. Greene*, 106 Ind. 279, 25 Am. & Eng. R. Cas. 322; *Burns v. Chicago, M. & St. P. R. Co.*, 69 Iowa, 452, 28 Am. & Eng. R. Cas. 409; *Jones v. New York C. & H. R. R. Co.*, 28 Hun (N. Y.), 364, 92 N. Y. 628. It is only when the facts and circumstances surrounding the injury point neither one way nor the other that the plaintiff must fail for want of affirmative proof.

At the time the railroad company proposed to prove by a competent person that it was the duty of a freight conductor on its road to look at and determine the condition of the coupling, brakes, etc., connected with his train, and that he was held responsible for their condition, this testimony was properly excluded. If there was any such rule or general direction as that proposed to be proved, it was presumably in writing. Such regulations are usually promulgated either by general rules or orders issued by those having the control or management of the company's affairs. In the absence of any showing that the duties of freight conductors in the respects mentioned were not prescribed by some written or printed rules adopted and promulgated by those having the management of the company, the evidence was properly excluded. For the same reason, the court ruled correctly in excluding parol evidence by which it was proposed to prove that the appellant company was, at the time of the injury complained of, under the management of another company, and that the printed rules of the latter company had been adopted by and extended over the appellant company. We must presume, until the contrary appears, that, if the two corporations were under one management, and the rules of the other corporation were adopted as the rules governing employees of the appellant, that there was in existence some order, instruction, or resolution manifesting the facts. The rules of another separate and apparently independent railroad company were not competent evidence to show the duties of the freight conductors on the appellant's road, until it was shown by some proper and competent evidence that they had been adopted and promulgated as the rules of the appellant. Besides, the excluded rule which was offered in evidence is not set out in the bill of exceptions. It does not appear, therefore, that the appellant was harmed by the ruling of the court. *La Rose v. Logansport Nat. Bank*, 102 Ind. 332.

Evidence as to
duty of con-
ductor to in-
spect cars.

The evidence tends to sustain the verdict.

We have thus examined all the points made on behalf of the appellant, without regard to the motion made to dismiss the appeal. We find no error. The judgment is affirmed, with costs.

Jurisdiction of Actions for Wrongful Death.—L. died in Kansas, from injuries there, for which it was claimed that, if death had not ensued, the Missouri Pacific R. Co., the party inflicting them, would have been liable to an action for damages. The statute of that state provides that an action may be brought against the party by the personal representative of the deceased. The widow, appointed under the laws of Nebraska administratrix of L., brought in the circuit court of Nebraska a suit against the railway company. *Held*, that the suit could be maintained, the right of action not being limited by the statute to a personal representative of the deceased appointed in Kansas, and amenable to her jurisdiction. The distribution of money, if recovered by the widow from the railway company, might be enforced by the courts of Nebraska in the manner prescribed by the statute of Kansas. The judgment of the county court of W. county, Nebraska, granting letters of administration to the widow, the sole assets of the estate consisting of the claim against the railway company, *held, coram judice*, and upheld. *Missouri Pac. R. Co. v. Lewis* (Neb.), 40 N. W. Rep. 401. The court said: "The first point insisted on by counsel for plaintiff in error is that the action was improperly brought in the state of Nebraska, it having accrued in the state of Kansas, and, not being transitory, it should have been prosecuted in the courts of the state of Kansas, and not elsewhere. Many authorities are cited in support of this position. Many of them may be distinguished as wanting analogy to the case at bar, but the time at our disposal will not admit of a general examination for that purpose. It is admitted that the cases of *Woodard v. R. Co.*, 10 Ohio St. 121; *Armstrong v. Beadle*, 5 Sawy. 484; and probably *Anderson v. R. Co.*, 37 Wis. 321, support the principle here contended for. The same may be said of *Whitford v. R. Co.*, 23 N. Y. 470. But the later cases of *Dennick v. R. Co.*, 103 U. S. 11; *Leonard v. Navigation Co.*, 84 N. Y. 48; *Morris v. R. Co.* (Iowa), 23 N. W. Rep. 143; *Stoeckman v. R. Co.*, 15 Mo. App. 503, which are in all respects analogous with the case at bar, hold to the contrary. Mr. Justice Thompson, delivering the opinion in the case last cited, without reference to that of *Vawter v. R. Co.*, 84 Mo. 679, says: 'The question is now, we believe, presented for the first time in this state. The decisions presented in other states are shown to be conflicting. These statutes are of recent origin. The question of their extraterritorial force has presented itself to various courts of the Union as a question of first impression; and, reasoning on various grounds, for the most part of a technical nature, they have arrived at different conclusions. In this conflict of authority, we are quite at liberty to adopt the view which seems best to consist with the policy of our legislation and with that spirit of comity which ought to subsist between different states of the Union. We accordingly hold that this action was well brought.' It is quite certain that the precise question is before this court for the first time; and I am willing to adopt the language of the court above quoted, as it expresses the conclusion I have come to after a careful examination of all the authorities accessible."

Fellow-servants—Negligence of Car Inspectors and Repairers.—It is a very common thing for train hands to receive injury through the negligence of persons employed by the company to inspect their cars, to discover defects and repair them. The weight of authority perhaps is to the

effect that the negligence of such employees in the performance of such duties cannot be attributed to the company, and it is consequently not liable for it. *Nashville, etc., R. Co. v. Foster*, 10 Lea (Tenn.), 351, 11 Am. & Eng. R. Cas. 180 (decided under laws of Alabama); *Smith v. Potter*, 46 Mich. 258, 2 Am. & Eng. R. Cas. 140; *Mackin v. Boston, etc., R. Co.*, 135 Mass. 201, 15 Am. & Eng. R. Cas. 196; *Columbus, etc., R. Co. v. Webb*, 12 Ohio St. 475; *St. Louis, etc., R. Co. v. Rice* (Ark., 1889), 11 S. W. Rep. 699; *St. Louis, etc., R. Co. v. Gaines* Ark. 555; *Smoot v. Mobile, etc., R. Co.*, 67 Ala. 13; *Little Miami, etc., R. Co. v. Fitzpatrick*, 42 Ohio St. 318, 17 Am. & Eng. R. Cas. 578; *Columbus, etc., R. Co. v. Webb*, 12 Ohio St. 475; *Kidwell v. Houston, etc., R. Co.*, 3 Woods (U. S.), 313. See also *Chicago, etc., R. Co. v. Bragonier*, 11 Ill. App. 516; *Wonder v. Baltimore, etc., R. Co.*, 32 Md. 411, 3 Am. Rep. 143. In *Philadelphia & R. R. Co. v. Hughes*, 119 Pa. St. 301, it was held that a railroad company is not ordinarily liable, for the negligent inspection of cars by car-inspectors, to a fellow-servant unless it has knowledge thereof. In *Byrnes v. New York, etc., R. Co.* (N. Y., 1889), 21 N. E. Rep. 50, the New York court of appeals held that a railroad company which has provided a proper car for loading, and has established a system and provided competent servants for the inspection of loaded cars before they are taken out, is not liable for an injury to a servant employed on its train, caused by the improper manner in which the car is loaded, such injury being the result, of the negligence of the fellow-servants of the injured person.

The ground on which these decisions are placed is that the railroad company's duty of inspection is performed by the employment of sufficient, competent, and suitable inspectors, who are to act under proper superintendence, rules, and instructions; and these inspectors must be deemed to be engaged in a common employment with the train men handling the cars. Such a rule, however, ignores the only true criterion of fellow-service. If the law imposes any duties at all upon the master of which he cannot relieve himself by delegating them to another, the duty of keeping machinery and instrumentalities in proper repair is one of them. A car inspector or repairer has delegated to him the duty which the railroad company impliedly contracts to perform as to its employees, viz., of examining and inspecting the cars run upon the company's road, and of pointing out and reporting any defects which he may discover in them, in order that such defects may be remedied, and the danger of the train hands, car-couplers, etc., removed. He performs this duty as a representative of the company, which should in justice be made to respond for his negligence. *McKinney on Fellow-servants*, § 122.

This position has been taken by a number of courts of high authority. The supreme court of Minnesota say: "The company are responsible for the negligence of the car-inspector. The duty to provide safe and suitable instrumentalities for its employees to work with is one which it cannot delegate to a servant so as to be relieved from responsibility; and this extends to the track, and the condition of the cars and machinery upon or in connection with which they are employed." *Fay v. Minneapolis, etc., R. Co.*, 30 Minn. 231, 11 Am. & Eng. R. Cas. 193. The supreme court of Kansas has used similar language: "In this case the railway company, the master, delegated to inspectors the duty of inspecting the freight cars, which included the trucks and draw-heads and brake-staffs thereon, to see whether everything was in order, and to repair defects if any were obvious or visible; therefore the inspectors represented the company, and were not fellow-servants of the plaintiff, who was only a brakeman." *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 58. And in *Carpenter v. Mexican Nat. R. Co.*, 39 Fed. Rep. 315, Judge Maxey said: "The mere fact that the defendant had in its employment a competent car-inspector would not

of itself exonerate it from liability if the brakes on the cars were defective in construction, or not in proper repair; for he was the representative of the defendant, and not a fellow-servant of plaintiff in the sense contended by the defendant's counsel; and, if he failed to exercise due and reasonable care in inspecting the brakes of the cars, and keeping them in proper repair, then for any negligence on his part in that respect, from which injury resulted to plaintiff, the defendant would be liable." Other courts have spoken in equally emphatic language in affirming this doctrine. *Condon v. Missouri, etc.*, R. Co., 78 Mo. 567, 17 Am. & Eng. R. Cas. 583; *Brann v. Chicago, etc.*, R. Co., 53 Iowa, 595, 36 Am. Rep. 243; *Chicago, etc.*, R. Co. v. *Jackson*, 55 Ill. 494, 8 Am. Rep. 661; *Tierney v. Minneapolis, etc.*, R. Co., 33 Minn. 311, 21 Am. & Eng. R. Cas. 545; *Macy v. St. Paul, etc.*, R. Co., 35 Minn. 200; *Chicago, etc.*, R. Co. v. *Hoyt*, 122 Ill. 369, 31 Am. & Eng. R. Cas. 309. In *King v. Ohio, etc.*, R. Co. (C. C. of Ind.), 8 Am. & Eng. R. Cas. 119, it was held by Gresham, J., that a car-inspector is not the fellow-servant in common employment of a brakeman in any such sense as to relieve the railroad company from liability for injury to the latter caused by the defective condition of the coupling apparatus of a car, which the car-inspector had failed to note. The court say: "The master's immunity is limited to cases where the servants are engaged in the same common employment; that is to say, in the same department of duty. Such immunity does not extend to cases where the servants are engaged in departments essentially foreign to each other. A servant cannot be held to have contemplated, in the adjustment of his wages, those dangers which arise from the carelessness of fellow-servants, without any reference whatever to the nature of their employment or duties. . . . The master is bound to protect the servant, not against all risks, but against risks which could be avoided by the exercise of reasonable care on the part of the master. The brakeman's employment exposes him to constant peril under the most favorable conditions. He is expected and required to act with despatch in coupling and uncoupling cars; and, when he is negligently required by the proper officer or agents to handle cars out of repair, unfit for use, and dangerous, and in doing so is injured, perhaps for life, without fault on his part, he should in justice have a remedy against his employer."

The supreme court of Arkansas in a recent case makes a distinction between general inspectors of cars and appliances and mere yard-inspectors. In the case of *St. Louis, etc.*, R. Co. v. *Rice* (Ark., 1889), 11 S. W. Rep. 700, in holding that a yard-inspector whose duties are to examine all cars as soon as they arrive, and a yard-foreman who is injured by the failure of the inspector to make proper examination, are fellow-servants, Judge Sandels says: "The railway company must have its repair shops to maintain its tools, rolling-stock, etc., in good repair, and it must have its inspectors, not only at its *terminals*, where a general overhauling is had, but at convenient stations along the line to detect such injuries as may have been received *en route*; and, should such company knowingly employ and retain persons incompetent for the performance of this high service, it would be liable to the person injured, though such person were fellow-servant of the inspector. . . . While we recognize the liability of the railway company for the wilful or negligent default of its chief inspectors and those deputed to supervise the condemnation of unsuitable tools, rolling-stock, etc., we cannot assent to the proposition that every yard-inspector on the line of a railroad is a vice-principal. Upon what we conceive to be the soundest principles and the weight of authority, we hold that the appellee and the yard-inspector were fellow-servants, and hence that the appellee had no cause of action against the appellant." There certainly can be no force in this position. The functions of a "chief" in-

spector and a yard-inspector differ only in degree. They both perform duties which the master has contracted with his servant shall be faithfully executed. If the master is chargeable with the negligence of one, there is not the least excuse for exempting him from liability for the default of the other.

Contributory Negligence—Flying Switches—Disobedience to Rule.—A railway company by a rule prohibited conductors and engineers from making flying switches. The deceased, a brakeman, working under the direction of an engineer, was not guilty of contributory negligence when the manner of switching by which he was killed had been the usual and customary way of doing the same, though he knew of the rule. *Union Pac. R. Co. v. Springsteen* (Kan.), 21 Pac. Rep. 774.

Same—Brakeman—Riding in Stirrup.—It was the custom of plaintiff's husband and other brakemen to ride in the stirrup on the side of flat cars. While so travelling, the car was suddenly derailed when passing a lumber pile, and he was crushed against the lumber and killed. But for the derailing of the car, he would have passed the lumber in safety. *Held*, that the court could not, as a matter of law, instruct the jury that the deceased was guilty of contributory negligence. *Held*, also, that the deceased was not bound to know the unsafe condition of the track, the defect causing the derailment not being so obvious as to charge him with negligence. *Pennsylvania R. Co. v. Zinc* (Pa.), 17 Atl. Rep. 614.

Same—Knowledge of Danger.—While descending the ladder of the caboose, a brakeman was struck and injured by the supply-pipe of a water-tank. The evidence showed that the brakeman was not descending from the caboose in the discharge of his duty, but for some purpose of his own. He had been employed on the same road for three months, knew of the situation of the water-tank, and that there was not sufficient space for a person to pass between the pipe and the train. *Held*, that he was guilty of contributory negligence which precluded a recovery. *Wilson v. Louisville & N. R. Co.* (Ala.), 4 S. Rep. 701.

Same—Insufficiency of Fences—Cow-catcher—Knowledge.—A brakeman, whilst in the discharge of his duties, was injured by the train being thrown from the track by a bull. The fences were insufficient to turn cattle, and the engine was without a cow-catcher. *Held*, that, even though the plaintiff knew of the insufficiency of the fences and the absence of the cow-catcher, his right to recover should be submitted to the jury. *Magee v. North Pac. Coast R. Co.* (Cal.), 21 Pac. Rep. 114.

Same—Hazardous Act—Orders.—A brakeman attempted to stop a coal-car from running down a side track, and possibly off at the end of it, by jumping upon the brake-beam under the car and pressing it down with his feet. In so doing he held himself to the car with one hand and pulled up the brake-chain with the other. The reason of his act was that the brake-pin was so bent that it could not be used in the ordinary manner. *Held*, that as he acted without orders, and as there was no rule of the company requiring him to stop the car in the manner in which he attempted it, he could not recover. *Judkins v. Maine Cent. R. Co.* (Me.), 14 Atl. Rep. 735.

Same—Defects—Notice to Company.—Complaint of a defective railroad-crossing, made to one who has no charge or control of the same, though he be a servant of the railway company, is no notice of the defect to the company. *Union Pac. R. Co. v. Springsteen* (Kan.), 21 Pac. Rep. 774.

Same—Evidence—Denial of Knowledge.—Where the answer in an action for personal injuries alleges that they were caused by plaintiff's own negligence, the plaintiff may testify that he had no knowledge of the defects

which caused the accident. *Magee v. North Pac. Coast R. Co. (Cal.)*, 21 Pac. Rep. 114.

Same—Knowledge of Defects—Matter of Defence.—The knowledge of an employee, of defects in the track and appliances which caused injuries sustained by him, is a matter of defence, and such an employee need not allege that the defects were unknown to him. *Magee v. North Pac. Coast R. Co. (Cal.)*, 21 Pac. Rep. 114. The court said: "In *McGlynn v. Brodie*, 31 Cal. 376, it is said, *arguendo*, that the pleader in that case had not overlooked the necessity of averring in his complaint the essential fact "that plaintiff had no knowledge that the same [cupola] was insecure." While it is sufficiently clear that the court then thought such an averment in a complaint necessary to constitute a cause of action in cases like the one then before it and the one now before us, the expression of an opinion upon a question not before the court for decision is not entitled to the same consideration as it would be entitled to if such a question had been involved in the case. In *Robinson v. Western Pac. R. Co.*, 48 Cal. 409, it was held that in actions placed on the negligence of defendants 'the complaint need not allege that the injury was done without fault of the plaintiff.' In *McQuilkin v. Central Pac. R. Co.*, 50 Cal. 7, the case of *Robinson v. Western Pac. R. Co.*, *supra*, is cited on this point approvingly. In *Indianapolis & C. R. Co. v. Klein*, 11 Ind. 38, which was an action by an employee of a railway company against the company, to recover damages for an injury received while in the employ of the company as a brakeman, there was a demurrer to the complaint. In passing upon it the court said: It is objected to this complaint that there is no averment of a want of knowledge by the plaintiff of the defects complained of. In other words, it is insisted that the plaintiff should in his complaint negative a knowledge or notice by him of the condition of the road and machinery. We do not think such averment necessary. It was a matter of defence, which would more properly appear in the answer.' In *Crane v. Missouri Pac. R. Co.*, 87 Mo. 588, 25 Am. & Eng. R. Cas. 440, the court says: 'It has been settled in this state since the case of *Thomson v. Railroad Co.*, 51 Mo. 191, that contributory negligence is a matter of defence, and that the *onus* of establishing it is on the defendant; and the rule has been reiterated in the late case of *Stephens v. City or Macon*, 83 Mo. 345. If the *onus* of proving contributory negligence, or of knowledge on the part of the plaintiff of defective machinery rests on the defendant, it would be a singular rule of pleading to require a plaintiff to aver negatively that he was not guilty of contributory negligence, or did not have knowledge of defective machinery, neither one of which he would be required to prove to make out his case, but which the defendant would be required to prove to make out his defence.' In *Hackford v. New York Cent. R. Co.*, 6 Lans. (N. Y.) 386, the court said: 'No precedent of a common-law declaration in a case for negligence can be found, I think, in which the plaintiff asserts that he was free from negligence, nor any decision that he is bound to make such proof.' This seems to accord with the rule that 'it is not necessary to state matter which would come more properly from the other side; the meaning of which is 'that it is not necessary to anticipate the answer of the adversary, which, according to Hale, C.J., is "like leaping before one comes to the stile."' Steph. Pl. 350. In *Lee v. Troy Citizens' Gas-light C.*, 98 N. Y. 115, the court says: 'In the multitude of cases of this general character, we know of none which requires of the pleader any independent or explicit allegation that the plaintiff himself was without fault.'

MURRAY

v.

GULF, COLORADO AND SANTA FÉ R. CO.

(Texas Supreme Court, February 12, 1889.)

Contributory Negligence—Pleading—Necessity of Allegation.—If plaintiff's case develops contributory negligence on his part, the defendant may take advantage of it although his answer contains no allegation of the same.

Same—What is—Instruction.—Contributory negligence precluding a recovery by an employee for personal injuries is such an act of negligence as that the injury would not have occurred if the employee had not been guilty of such act of negligence.

Same—Fireman—Mounting Tender.—If a fireman, contrary to the orders of the company, attempted to mount the tender at the end approaching him, and did not wait until the cab-step came opposite to him, where he could with safety have entered at the proper place, he cannot recover for injuries caused by a hand-hold upon the tender giving way by reason of its defective fastening.

ERROR from District Court, Galveston County.

Trezevant & Franklin for plaintiff in error.

J. W. Terry for defendant in error.

COLLARD, J.—This suit was brought by Robert G. Murray, plaintiff in error, against the Gulf, Colorado & Santa Fé R. Co., for damages for injuries received by him while an employee of the company. It is alleged that he was a fireman on an engine used in defendant's switch-yard in the city of Galveston; that while he was in the discharge of his duty, and while in the act of ascending the tender, he caught hold of a hand-hold on the tender, which, being insecurely fixed, gave way, by reason of which he fell to the track or road-bed, and was run over by the tender then in motion, causing the injuries complained of. Plaintiff alleged that the hand-hold was a rod fixed to the tender, and was intended to be used as a means of ascending the tender, and that the rod, though in place, was not fastened; all of which was unknown to plaintiff, but which by proper care ought to have been known to defendant. On the trial defendant relied upon facts showing that plaintiff's injuries were proximately caused by his own negligence; that the engine and tender were moving at the rate of

Facts.

about two miles an hour, the tender in front; that there was a step at the cab on the engine, intended for the engineer and fireman to get off and on the engine; that the fireman's place was in the cab; that the engine and tender were moving slowly, and plaintiff should have waited for the tender to pass, and mounted the engine at the cab-step, but, instead of so doing, took the risk of mounting at the rear end of the tender, while it was moving towards him, upon a board used by brakemen in coupling cars to the tender; and that it was by his own fault and want of care that he fell and got hurt.

The pleas of defendant were a general denial, and a general allegation that plaintiff's injuries were the result of his own contributory negligence, and that but for his own carelessness such injuries would not have occurred. Plaintiff specially excepted to the sufficiency of the plea, because it set up no facts indicating negligence of plaintiff. The court overruled the special exception, and this ruling is assigned as error by the plaintiff. We agree with plaintiff that the plea is too general. It is an abstract proposition, and no evidence could properly be admitted under it if the law under the facts of the case required contributory negligence to be pleaded. *Morrison v. North American Insurance Co.*, 69 Tex. 353; *Gulf, C. & S. F. R. Co. v. Fox*.

But was a plea of contributory negligence required under the facts of this case? It was held in the case of *Texas & N. O. R. Co. v. Crowder*, 63 Tex. 503, that the plaintiff is not exercise of only required to show that the defendant was guilty of negligence, but that he himself acted with due care. Justice Stayton, delivering the opinion, says: "The burden of proof resting on the plaintiff upon, the issues of negligence of the defendant, and his own due care, requires that he should show the facts surrounding and leading to the accident, and if from these, when shown, a jury may reasonably infer negligence in the defendant contributing to the injury, and the exercise of due care by the plaintiff, then he is entitled to a verdict; but if he does not show how the accident occurred by which he was injured, by showing his own relation to it, and the other surrounding facts, some or all of which may appear from the character of the accident itself, then he has not gone with his evidence as far as the law requires him to go to authorize a recovery." The case under consideration to which the above doctrine was applied was a peculiar one. A brakeman was killed by the cars running over his leg, and crushing it. His mother brought suit for damages under the statute. There was no evidence showing how the accident occurred; no one saw him at the time the injury was received.

Sufficiency of plea of contributory negligence.

When contributory negligence must be pleaded.

and consequently there was no evidence of any negligence on the part of the company. We conclude from the opinion that it is always incumbent on a plaintiff suing for injuries received by an employee to show how and under what circumstances the accident occurred; how he was employed at the time; what the facts were constituting the negligence of the defendant; and, if his own conduct was connected with the negligence of the defendant so as to bring about the injury, to show that connection, and in so doing to acquit himself of carelessness, or establish the fact that he was exercising due care,—for if in the necessary statement of his own case, and his connection with it, it appears that he was negligent, or failed to exercise proper caution, he could not recover. He could not recover unless it is shown how the injuries were received. We do not understand the court to hold that the plaintiff must do more than to develop his own case, and in so doing show negligence of defendant causing the injury, and at the same time, while showing his own relations to the occurrence, relieve himself of responsibility for it. Negligence might exist on his part outside of his own necessary proof. After proof of his case establishing the negligence of the defendant, and his own acts immediately connected therewith as free from fault, there may yet be such negligence on his part independent of his *prima facie* case as will discharge defendant of liability, and which, to become available as a defence, must be shown by the defendant. Such defence, we understand, must be alleged and proved by the defendant. *Dallas & W. R. Co. v. Spicker*, 61 Tex. 427, 21 Am. & Eng. R. Cas. 160. In the case of *Texas & P. R. Co. v. Murphy*, 46 Tex. 363, Chief Justice Roberts explains the doctrine as follows: "It is often stated that the plaintiff must show that the injury was caused by the negligence of the defendant, without any fault or negligence on his part. It would be more correct, it is thought, to say that the plaintiff must show that the injury of which he complains was produced by the negligent acts of the defendant under such circumstances as did not develop any negligence on his part contributing to his injury." In the case of *Dallas & W. R. Co. v. Spicker*, *supra*, Justice Stayton says: "We believe the true rule to be that thus stated by an elementary writer: 'No doubt where, in an action for injuries caused by failure of duty on the part of the defendant, the failure of duty and the injury are shown by the plaintiff, and there is nothing that implies that he brought on the injury by his own negligence, then the burden is on the defendant to prove that the plaintiff was guilty of such negligence. On the other hand, when the plaintiff's own case exposes him to suspicion of negligence, then he must clear of such suspicion.' Whart. Neg. § 426." The

principle decided in the case of *Texas & P. R. Co. v. Murphy*, *supra*, was reaffirmed in the case of *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 302, "that in a suit for damages against the railway company, on account of the alleged negligence of its agents, it is not necessary that the petition should negative, either by facts stated or by direct averment, the existence of contributive negligence on the part of plaintiff. An exception to this rule exists when the petition from its averments would establish, if unexplained, a *prima facie* case of negligence of the party injured." The doctrine is in all our cases guarded that, if plaintiff's case develop his own want of care defendant can take advantage of it. If defendant relies upon contributory negligence not developed by the plaintiff's case, he must allege it. It is a defence in the nature of avoidance. Dist. Ct. Rule 7; *Texas Mut. Life Insurance Co. v. Davidge*, 51 Tex. 244; *Houston & G. N. R. Co. v. Parker*, 50 Tex. 346; *Beach, Contrib. Neg.* § 157. But see, *contra*, 1 *White & W. Civil Cas. Tex. App.* § 382; 2 *Wilson, Civil Cas. Tex. App.* § 483; 2 *Thomp. Neg.* 1179. Under the rule, however, that plaintiff must make out his whole case if it appear from the facts and circumstances attending the injury that his own negligence contributed to it, he must affirmatively show that he was excused or justified. *Beach, Contrib. Neg.* 432.

In the case before us plaintiff's petition did not commit him to any charge of negligence, but he was nevertheless bound to develop his whole case in his proof: that he was a fireman; that the engine and tender were in motion, and how moving; where his post as fireman was; why he was absent from it; his return to it; how he mounted the tender; upon what he mounted; the uses of the board upon which he mounted; the usual mode and means of access to the cab for the engineer and fireman; that he did not seek the usual entrance to the cab, which was shown to be safe; and, in short, all the facts attending and surrounding the accident, his own conduct, and the conduct of others. If in doing this he omitted any such fact, defendant had the right to supply it. It was his duty to show how and why the injury occurred; and when this was done, the jury inferred, as the evidence warranted them in doing, that he was guilty of contributory negligence. Plaintiff's own case necessarily put in issue all the facts relied on by defendant to show his contributory negligence, and, such being the case, he was obliged to acquit himself of fault. The burden of proof was on him to do this, and he could not recover until it was done. It is seen, then, that the case, under the facts, required no plea of contributory negligence, and the error of the court in overruling the special exception to the insufficient plea was rendered harmless.

Contributory
negligence
need not be
pleaded in
present case.

The court instructed the jury that "negligence on the part of an employee is a want of such care and prudence as persons of ordinary care and prudence observe under similar circumstances. Negligence is a question of fact to be determined by you from the evidence, just as you determine any other fact. Contributory negligence, by an act of negligence on the part of an employee, is such an act of negligence as that the injury would not have occurred if the employee had not been guilty of such act of negligence." The court refused instructions asked by plaintiff that "he was not bound to the utmost possible caution, but only to ordinary care and prudence ;" that, if both plaintiff and defendant were guilty of negligence, to defeat a recovery by plaintiff his negligence must have been the proximate and efficient cause of the injury. The court's charge upon contributory negligence, and the refusal of the instructions asked by plaintiff, are assigned as error. There was no necessity for the court to repeat the charge that plaintiff was only bound to use ordinary care. The general charge so instructed the jury. The very question raised as to the court's definition of "contributory negligence," and the definition as contained in the refused charge, was before the court in the case of *R. Co. v. Ormond*, 64 Tex. 489. Associate Justice Robertson, delivering the opinion for the court in reference to it, says: "The authorities all agree that plaintiff could not recover if the negligence of James Ormond proximately contributed to his death. This expression does not convey to the unprofessional mind a sufficiently definite idea. The act of negligence proximately contributes to the injury when without the act of negligence the injury would not have been inflicted. The court below did not err in the general charge in submitting this issue in eschewing the technical expression. The charge correctly lays down the rule in language intelligible to the jury." We think the above sound law. *Wood, Mast. & Serv.* 638 ; *Beach, Contrib. Neg.* p. 14, § 7.

Plaintiff insists that the verdict of the jury was contrary to the law and the evidence because "there was no proof that plaintiff had any knowledge of the defectiveness of the rod by reason of which he was injured and no proof that plaintiff's negligence was the proximate or efficient cause of the injury." It is true there was no evidence that plaintiff knew the rod was loose or defective, and it is also true that his negligence did not consist in knowing the fact. It consisted in imprudently mounting the tender at the end approaching him, contrary to orders of the company, in failing to wait until the cab-step came opposite to him, where he could have entered with safety at the entrance made for his use, and in failing to wait until the engine and

Contributory
negligence defined.

Evidence sufficient to show contributory negligence.

tender stopped. Without his own negligence, he would not have been injured. The verdict answers correctly the evidence and the law. We have found no error in the rulings or charge of the court or in the verdict. The judgment of the lower court ought to be affirmed.

STAYTON, C.J.—Report of commission of appeals examined, their opinion adopted, judgment affirmed.

Contributory Negligence of Employee in Getting upon Cars or Engine in Motion.—See notes, 33 Am. & Eng. R. Cas., 364, 367; Richmond, etc., R. Co. v. Moore, 15 lb. 239.

Injuries to Servants—Contributory Negligence—Province of Jury.—Plaintiff, an engineer, brought an action to recover damages for injuries sustained in an accident caused by the train leaving the track. He contended that the accident happened in consequence of the roadbed being defective to such an extent and under such circumstances as to render defendant liable. Defendant claimed that plaintiff was guilty of contributory negligence because he was running faster than twenty miles an hour, the superintendent having instructed him not to exceed that speed, and because the rules of the company limited the speed to ten miles an hour before crossing trestles and bridges. The place of the accident was near a trestle, and the accident occurred whilst the train was being run at a greater speed than ten miles an hour. Plaintiff's evidence tended to show that he had been over the road but once before and had no experience upon it, or knowledge of the track; that it was therefore impossible for him to remember at night where the trestles were. He testified that he did not know at the time that this particular trestle was immediately in front of him. He also testified that he had never seen or read the train rules governing the running of trains on the road. Defendant's superintendent testified that he understood plaintiff had only been over the road once, that he explained to him that he could rely upon the conductor, and told plaintiff that the rate of speed should not exceed twenty miles an hour. He also testified that he did not know if plaintiff ever saw the train rules or read them. *Held*, that it was error to refuse to submit the question of contributory negligence to the jury. *Dunlap v. Northeastern R. Co.*, 130 U. S. 649.

Same—Sufficiency of Evidence.—Plaintiff's intestate, a fireman, was killed by the derailing and overturning of a train. When the accident happened the engineer was for the moment away from his post. The fireman was in the engineer's place, presumably by his order. He had applied the brake, and the engine was going slowly when a pine knot caught in the pilot, raised the engine from the track, ran it off at a curve, and upset it upon the fireman. *Held*, that the evidence, in view of the rules of the company making the fireman subject to the directions of the engineer, was sufficient to sustain a finding that the fireman was clear of fault or negligence, and in the proper discharge of his duty. *Denver, S. P. & P. R. Co. v. Wilson (Colo.)*, 20 Pac. Rep. 340.

Same—Disobedience to Orders—Setting Cars in Motion.—Plaintiff was charged with the duty of unloading certain cars on a side track. He was warned twelve or fifteen minutes before the accident that he must not move the cars; but disregarding the warning, he applied his cross-bar to the cars, and set them in motion. They moved down the side track and onto the other track, and in consequence a collision occurred, and the plaintiff was injured. *Held*, that the accident was caused solely by plaintiff's negligence, and he could not recover. *Georgia Pac. R. Co. v. Mapp (Ga.)*, 6 S. E. Rep. 24.

Same—Car-repairer—Duty to Call for Assistance.—Plaintiff was a night car-repairer in the employment of the defendant, and his duty was to make minor repairs on cars which passed over the road during the night. The draft-iron in a way-car having been knocked out in the course of switching, plaintiff was directed to repair it. Plaintiff went to the car and discovered that a new draft-iron was required. He requested the car to be placed in position to do the work. It was put upon a side track near the tool-house where the draft-iron lay. Plaintiff removed the old draft-iron, took hold of the new one and dragged it some ten or twelve feet to the car and attempted to put it in place, and in doing so he slipped on the ice and was injured. After he was injured, he called for assistance in doing the work, and one of the yardmen went to his aid and put the draft-iron in place. Plaintiff knew of the weight of the draft-iron, which was about 240 pounds, and had frequently done such work. There was an employee whose duty it was to assist the plaintiff in his work as a night repairer, but he was absent at the time. *Held*, that as plaintiff could have obtained other assistance, the company was not liable. *Way v. Chicago & N. W. R. Co. (Iowa)*, 41 N. W. Rep. 51. The court said: "In our opinion the undisputed facts show that the plaintiff, with a full knowledge of all the circumstances surrounding him, voluntarily undertook to raise up and place the draft-iron alone; and, if he was injured, he alone was in fault. The doctrine has become elementary that where an employee uses the machinery and appliances, and does his work in the place, furnished by the employer, and with such assistance as is furnished to him, with full knowledge of all the facts in connection therewith, and without complaint to the employer, he cannot recover damages upon the ground that the employer was negligent in failing to provide for his safety. We think no authority can be found which holds otherwise. It may be conceded that the plaintiff made complaint of the absence of the employee whose business it was to assist him; but, as we have seen, the evidence conclusively shows that there were other employees ready to come to his aid. See *Lumley v. Caswell*, 47 Iowa, 159; *Money v. Lower Vein Coal Co.*, 55 Iowa, 671; and *Heath v. Whitebreast Coal Co.*, 65 Iowa, 737."

Same—Contributory Negligence—Necessity of Averring Absence of.—In an action for damages for negligently causing the death of plaintiff's husband, it is not necessary to aver that there was no contributory negligence on the part of the deceased, provided the complaint contains an averment that the injury resulted from the negligence of the defendant. *Hickman v. Kansas City, M. & B. R. Co. (Miss.)*, 5 S. Rep. 225. The court said: "Whether it was necessary for the declaration to contain such an allegation is an open question in this state. *Vicksburg v. Hennessy*, 54 Miss. 391, to which we are referred by counsel, does not apply, for in that case the plaintiff's own testimony showed that the injury of which he complained was occasioned by his own fault, and neither the question of pleading nor the burden of proof was before the court. In Alabama, California, New York, and Texas it is held, in accordance with the precedents of declarations at common law in like cases, that it is not necessary, in an action to recover damages for personal injuries caused by the negligence of another, for the plaintiff to allege specially or distinctly in the declaration that the injury occurred without fault on the part of the person injured, or that he exercised reasonable care to avoid it. *Mobile & M. R. Co. v. Crenshaw*, 65 Ala. 566, 8 Am. & Eng. R. Cas. 340; *Robinson v. Western Pac. R. Co.*, 48 Cal. 409; 1 *Estee, Pl. & Pr.* § 1836; *Lee v. Gaslight Co.*, 98 N. Y. 115; *Texas & P. R. Co. v. Murphy*, 46 Tex. 356; *Hackford v. New York Cent. R. Co.*, 6 Lans. (N. Y.) 381. A different rule prevails in some localities, but it is believed that the weight of reason and

authority is against it. The allegation that the injury was produced in consequence of the negligence of the employees of the defendant implies that there was no negligence on the part of the deceased contributing to it, and, as a matter of pleading, it was sufficient."

In an action against a railroad company to recover damages for personal injuries to a brakeman, occasioned by the negligence of a co-employee, it is unnecessary for the plaintiff to aver that there was no fault or negligence on the part of the injured person. Contributory negligence is a matter of defence. *Missouri Pac. R. Co. v. McCally* (Kan.), 21 Pac. Rep. 574.

GRIFFIN

v.

BOSTON AND ALBANY R. CO.

(Massachusetts Supreme Judicial Court, January 1, 1889.)

Injuries to Servant—Detached Car—Spreading Link—Negligence.—Where the rear car of a train became uncoupled by reason of the spreading of a link, and an employee who, in the discharge of his duty was waiting for the train to pass, attempted to cross and was run over by such car, which was travelling rapidly, without signals, and without any person in charge, the administrator of such employee, in an action for damages, is entitled to have the case submitted to the jury upon the question of the defendant's negligence, and also upon the question of the own contributory negligence of the deceased.

ON report from Superior Court, Hampden County.

Action of tort under Mass. Pub. Stat. c. 112, § 212, as amended by Acts 1883, c. 243, by the administrator of Bartholomew

Case stated. Griffin, against the Boston & Albany R. Co., to recover damages for negligently causing the death of plaintiff's intestate. At the trial plaintiff's counsel offered, in opening, to show that the deceased was employed as night watchman at the passenger station of the defendant at Springfield, that on the night of the accident a freight train passed through the depot, and deceased, thinking that the whole train had passed, attempted to cross the track, but was run over by certain of the cars which had become detached through the spreading of a coupling-link. Defendant thereupon asked the court to rule that the action could not be maintained. A ruling was granted in terms of the motion and a verdict ordered for the defendant.

W. H. Brooks and *J. B. Carroll* for plaintiff.

Geo. M. Stearns for defendant.

C. ALLEN, J.—The two things to be considered are whether, in view of the plaintiff's offer of proof, he was entitled to go to the jury upon the question of the want of due care on the part of the defendant, and of the exercise of due care on the part of the plaintiff's intestate; and both of these matters must be determined upon the assumption that the plaintiff proved his case according to his offer, and that the defendant offered nothing by way of explanation.

1. Upon the question whether there was enough evidence of a want of due care on the part of the defendant, the difficulty is not so much in the ascertainment of the general rules as in their application. There is no doubt that as a general rule a master is bound to exercise reasonable care in providing suitable machinery, instruments, means, and appliances for his work. It is also well settled that if he has failed to do so, and an injury has resulted to his servant, the master is responsible, although the negligence of a fellow-servant contributed to the accident. *Cayzer v. Taylor*, 10 Gray (Mass.), 274; *Elmer v. Locke*, 135 Mass. 575, 15 Am. & Eng. R. Cas. 300; *Booth v. Boston & A. R. Co.*, 73 N. Y. 38; *Cone v. Delaware, L. & W. R. Co.*, 81 N. Y. 206, 2 Am. & Eng. R. Cas. 57; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 11 Am. & Eng. R. Cas. 254. It is also clear that the plaintiff must introduce evidence to show that the injury is more naturally to be attributed to the negligence of the defendant than to any other cause. If the accident appears upon the evidence to be as consistent with the absence of negligence, for which the defendant is responsible, as with the existence of such negligence, the plaintiff must fail, and the case should not be left to the jury. *Kendall v. Boston*, 118 Mass. 234; *Wakelin v. Railway Co.*, 12 App. Cas. 41; *Scott v. London, etc., Docks Co.*, 3 Hurl. & C. 596; *Cotton v. Wood*, 8 C. B. (N. S.) 568; *Ham-mack v. White*, 11 C. B. (N. S.) 588.

Duty of employer as to machinery and appliances.

In the present case, upon the plaintiff's offer of proof, it is obviously possible that the injury may have sprung either wholly or partly from the defendant's negligence, or from some cause independent of any negligence for which the defendant would be responsible to the plaintiff. But a plaintiff in a civil case is not required to prove his case beyond a doubt. All that the plaintiff upon this branch of his case was required to do was to make it appear to be more probable that the injury came in whole or in part from the defendant's negligence than from any other cause. No general rule can be laid down that the mere occurrence of an accident is or is not sufficient *prima facie* proof of actionable negligence, for each case must depend upon its own circumstances; and what would be sufficient proof of such negligence in an action brought against a railroad company by a

passenger, or by a stranger, might not be so in an action brought by one of its servants. The question is whether this plaintiff, upon his offer of proof, was entitled to go to the jury upon the question of the defendant's negligence.

The general rule as to the defendant's duty in providing means and instruments for the operation of its railroad has been already stated. Clearly the providing of a sufficient quantity of suitable links for coupling the cars of a train fell within this duty. This is a duty which belonged to the defendant as master, and could not be delegated. If, through a want of reasonable care and diligence, unsafe coupling-links were furnished, even though this were done by agents of the railroad company, the neglect is to be treated as the neglect of the company itself. Now, it is true that the defendant may have used due care, although the particular coupling-link which spread or opened, and thereby led to the accident, proved to be unsuitable or unsafe. There may have been a latent defect which was undiscoverable. The link in question may have come with a car from another railroad, so that the defendant's duty was merely one of inspection, and the defendant may have done its duty in this respect. Or, in other particulars, the fault may have been the fault of a fellow-servant, for whose negligence the defendant would not be responsible to the plaintiff. It may have been that the defendant could have exonerated itself fully from liability. But what we have to consider is whether, under the circumstances, the plaintiff went far enough with his offer of proof to put the defendant upon its defence,—far enough to make out a *prima facie* case; and in considering this question it is impossible not to take into view the knowledge which the plaintiff and the defendant, respectively, possessed, or had the means of obtaining. The history of this broken link is not disclosed,—whether it was new or old, whether originally sufficient or insufficient, worn or not worn, whether it was furnished by the defendant itself, as a part of its own equipment, or whether it came from some other railroad. These facts, it is reasonable to assume, were not within the plaintiff's knowledge or means of knowledge. The railroad train was under the management of the defendant. The defendant knew or had the means of knowing where and by whom the train was made up, of what cars it was composed, and what degree of care and diligence had been observed in making it safe to be run. The separation of a train in consequence of the spreading of a link, where nothing further appears, is more naturally to be attributed to an imperfection or defect in the link than to any other cause. Ordinarily such separation would not happen if the link was sound and suitable for use. If the link was not sound and suitable for use, the fact of its being used in

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that condition properly calls for explanation from the defendant ; and if, under such circumstances, the defendant fails to put in any evidence, some inference against it may be drawn therefrom. The fact may be susceptible of an explanation sufficient to exonerate the defendant. But, in the absence of such explanation, we think the jury might properly infer negligence on the part of the defendant. Primarily, in such case, one may properly look to the railroad company itself, whose duty it is to use reasonable care to provide safe instruments and means for operating the railroad. In the absence of any explanation by the company, it is more probable that the separation of the train was from a cause for which it would be responsible than that it was from a cause for which it would not be responsible. See *Scott v. London, etc., Docks Co.*, 3 Hurl. & C. 596; *Bridges v. N. London R. Co.*, L. R. 6 Q. B. 377, 391, by Channell, B. We think, on the whole, that the plaintiff was entitled to go to the jury upon this point.

2. The remaining question is whether the plaintiff's intestate himself appeared to be in the exercise of sufficient care; and upon this question also the court is of the opinion that upon the offer of proof it would be for the jury. The approaching train had become separated into two parts, from an unusual cause, and no notice had reached the plaintiff's intestate that it had become thus separated. A jury might find it consistent with the exercise of due care on his part to assume, when the first portion of the train had gone by, that the whole train had passed. *Maguire v. Fitchburg R. Co.*, 146 Mass. 379, 34 Am. & Eng. R. Cas. 9.

Case to stand for trial.

Injuries to Servants—Contributory Negligence—Presence on Track.—Whilst plaintiff's intestate, a track hand, was standing on the track, a passenger train came around a curve at the rate of from 20 to 35 miles an hour and ran over and killed him. The train could have been seen by deceased at a distance of about 200 yards, and those in charge of the train could see him at a like distance. One of plaintiff's witnesses, who saw the train at a distance of about 150 yards, testified that no signal was given or effort made to stop the train until the deceased was struck. The fireman and engineer, who saw the deceased at the distance of 100 and 50 yards, respectively, testified that they attempted to stop the train, and made signals. They knew that men were working at this point on the railroad. *Held*, that the court properly refused to direct a verdict for the defendant. *Sullivan v. Missouri Pac. R. Co.* (Mo.), 10 S. W. Rep. 852.

Same—Province of Jury.—Plaintiff, an employee of defendant, was in the depot on business. There was a passenger platform alongside the tracks, which ran between it and the depot. There was also a side track that went through the depot. Plaintiff passed out of the depot by the usual way and was struck between the wall of the depot and the platform. He testified that the way he was going he could not see a train approaching from the east because there was a car on the side track, and he had no warning of an approaching train, although he listened as he went out of

the depot. There were also some evidence that there was so much noise at the place of exit from the depot that he could not have heard an approaching train.' On the other hand, there was some testimony to show that plaintiff ran carelessly through the depot, that he knew the train was approaching and that he might have guarded himself against it if he had stopped long enough at the exit of the depot to have looked about him. *Held*, that the evidence was not such as to authorize the court to direct a verdict for the defendant on the ground of contributory negligence. *Jones v. East Tennessee, Va. & Ga. R. Co.*, 128 U. S. 443.

Same—Trackman—Assumption of Risks—Dirt Train.—Plaintiff's intestate, a trackman, had been in the employ of defendant for nearly a year. At the time of his death he was working on the track with his back towards the train that struck him. This train, a dirt train, was running at the time with the engine reversed. It had been engaged at this work for about a year previous to the accident, making six trips daily over the section on which the intestate worked. *Held*, that a nonsuit was properly granted, the danger of being injured by one of these trains being one of the risks of employment which the intestate had assumed. *Kennedy v. Pennsylvania R. Co. (Pa.)*, 17 Atl. Rep. 7.

CHICAGO AND NORTHWESTERN R. CO. *et al.*

v.

SNYDER.

(*Illinois Supreme Court, May 16, 1889.*)

Collision—Death of Conductor—Conflicting Testimony—Province of Jury.—In an action to recover damages for the death of a conductor in a collision between two trains, the plaintiff introduced testimony tending to show that deceased stopped his train before coming to the crossing at the distance therefrom required by statute and the company's rules, that he kept a proper lookout for the customary signals, and that the signalman gave the wrong signal. Defendants introduced testimony tending to show that the conductor did not stop at the proper stopping place, and did not keep the requisite lookout, and that the signalman gave the proper signal. *Held*, that the question of the defendants' liability was properly submitted to the jury.

Same—Railroad Crossing—Negligence of Signalman—Verdict against both Companies.—In such action, the jury are justified in rendering a general verdict for the plaintiff on the ground that the signalman, who was in the joint employment of the two defendant companies and was engaged in giving signals to the trains, was negligent, although a special finding is also returned that the employees in charge of the train belonging to one of the companies were not guilty of any want of care.

Same—Signalman—Liability of Companies—Joint Employment.—The evidence tended to show that the signalman was employed and paid by both companies and managed the signals of the crossing in the interest of both companies. *Held*, that an instruction that he was the agent of only one of the companies was properly refused.

APPEAL from Appellate Court, First District.

Action to recover damages for negligently causing the death

of plaintiff's intestate. The defendants appeal from a judgment for the plaintiff.

E. Walker for Chicago, Milwaukee & St. Paul R. Co., appellant.

W. C. Goudy and *W. B. Keep* for Chicago & Northwestern R. Co., appellant.

Mason B. Loomis for appellee.

MAGRUDER, J.—This case is now before us for the second time. The first decision of it is reported as *Chicago & N. W. R. Co. v. Snyder*, 117 Ill. 376, 28 Am. & Eng. R. Cas. 611. The second trial in the court below has again resulted in a verdict and judgment in favor of the plaintiff, and in an affirmance of such judgment by the appellate court. Case stated.

The action is brought against the Chicago & Northwestern R. Co. and the Chicago, Milwaukee & St. Paul R. Co., to recover damages for the death of John H. Snyder, resulting from the collision of a train of the former company with a train of the latter company at a point where the tracks of the two companies crossed each other. The facts are settled by the judgment of the appellate court.

The first error assigned is the refusal of the trial court to instruct the jury to find for the defendants. There was evidence on the part of the plaintiff tending to prove the issues involved, and, therefore, it would have been improper to take the case from the jury. The first question to be determined was whether Snyder, who was the conductor of a train on the Northwestern road, travelling eastward, was exercising ordinary care in the management of his train when the accident occurred. The plaintiff introduced testimony tending to show that the deceased stopped his train before coming to the crossing, at the distance therefrom required by the statute and the rules of the company, and that he kept a proper lookout for the customary signals. Defendants introduced testimony tending to show that he did not stop at the proper stopping place, and did not keep the requisite lookout. These were matters for the jury to decide. The next question to be determined was whether Torrence, who was in the charge of the semaphore, as the paid agent and employee of both of the defendant companies, was guilty of negligence in failing to give Snyder such signal as it was necessary for him to have in order to move his train safely over the crossing. When the semaphore was so managed as to throw a green light upon the track, a waiting train had the right to advance; while the red light on the track was a signal to such a train not to move. The plaintiff introduced evidence tending to show that Torrence

Defendants' liability a question for the jury.

threw the wrong light at the wrong time, so as to induce Snyder to go forward when he should have remained stationary, and that the careless management of the signal on the part of Torrence was the cause of the collision. The defendants offered testimony for the purpose of negating this theory. It was the province of the jury to pass upon the question.

The supreme court of the United States holds as follows: "Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved. It should never be withdrawn from them, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it." *Phoenix Mut. Life Ins. Co. v. Doster*, 106 U. S. 30; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 15 Am. & Eng. R. Cas. 243; *Goodlett v. Louisville & N. R. Co.*, 122 U. S. 391, 33 Am. & Eng. R. Cas. 1; *Kane v. Northern Central R. Co.*, 128 U. S. 91. In *Blanchard v. Lake Shore & M. S. R. Co.*, 18 N. E. Rep. 799, this court sustained the trial court in instructing the jury to find for the defendant because the testimony on the part of the plaintiff in that case was of the conclusive character mentioned in the above quotation, it having been made to appear that, when plaintiff's intestate was killed, he was walking along upon the railroad track, at a place where there was no regular crossing—an act which had already been held to be proof of the want of that ordinary care always necessary to be shown in order to secure a recovery in an action of this kind. No such failure to establish a cause of action is presented by the record now before us, *Chicago, W. D. R. Co. v. Mills*, 105 Ill. 63, 11 Am. & Eng. R. Cas. 128.

The jury found specially, in answer to a question prepared by one of the defendants, that the employees on the Chicago, Milwaukee & St. Paul R. Co. who were in charge of the latter company's train when it crossed the track of the Chicago & Northwestern R. Co., were not guilty of "negligence that materially contributed to the injury complained of." This finding is not inconsistent with the general verdict. By the latter, the defendants were found guilty by reason of the negligence of Torrence, who was in the joint employment of the two companies, in failing to properly manage the semaphore. Torrence was not upon either of the trains which collided. He was in the signal station, which was 90 feet west of the crossing where the collision took place. He may have been guilty of negligence, and yet those who were in charge of the train crossing the tracks may have been entirely innocent of any want of care. We cannot

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inconsistent.

stop to comment upon all the special findings in this record. After a careful examination of them we see no such inconsistency in them with the general verdict as would justify us in again reversing this cause. We can but repeat the language heretofore made use of in *Chicago & A. R. Co. v. Murray*, 71 Ill. 601: "We have no doubt the deliberations of the jury are in many cases embarrassed by voluminous instructions, drawn by ingenious counsel, calling for special findings, and the practice ought not to be encouraged."

The second instruction, shown by the present record to have been given for the plaintiff, is the same as the third instruction commented upon in our former opinion in *Chicago & N. W. R. Co. v. Snyder*, *supra*. The defect in it, which we there held to be fatal, was obviated by a proper correction before it was given upon the second trial. As it now reads, it submits to the jury the question whether those engaged with Snyder in the management of his train, as well as Snyder himself, were exercising due care when the accident happened. The only objections now made to the instruction are those which we held to be insufficient when the case was here before. The trial court refused to give an instruction asked by the defendant, the Chicago, Milwaukee & St. Paul R. Co., which holds substantially that, under the circumstances attending the collision of the trains, Torrence was the agent only of the Chicago & Northwestern R. Co., and not of the other defendant. There was proof tending to show that he was employed by both companies, paid by both companies, and operated the semaphore in the interest of both companies. The tracks of the Northwestern road ran east and west, and those of the St. Paul road crossed them, running from the northwest to the southeast. Just before the collision took place, there was a train on the Northwestern road, east of the semaphore, and bound for the west. There was a train on the St. Paul road, also, east of the semaphore, and bound for the northwest. There was still another train, west of the semaphore, and bound for the east. It was this latter train of which the deceased was the conductor. The testimony tended to prove that, at the time of the accident, Torrence was engaged in directing the movements of all three of these trains by the turning of the semaphore. If the jury should find that he was so engaged they would find that he was in the service of both defendants when Snyder was killed. To have given an instruction which would have led them to believe that he was the servant of one defendant only, at that time, would not have been based upon the evidence, and therefore the refusal to give it was not erroneous.

At the request of the defendant the Chicago & Northwestern

Signal-man
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R. Co., the court below gave the jury an instruction embodying the rule heretofore laid down by this court, which requires "that the servants of the same master, to be co-employees so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the others, shall be directly co-operating with each other in a particular business, in the same line of employment, or that their usual duties shall bring them habitually together, so that they shall exercise a mutual influence upon each other, promotive of proper caution." North Chicago Rolling Mill Co. *v.* Johnson, 114 Ill. 57, and Chicago & N. W. R. Co. *v.* Snyder, *supra*. The instruction so given is marked "Defendant's Instruction No. 1." The jury returned a negative answer to the following question: "At the time of the accident causing Snyder's death, did the usual duties of said Snyder and Torrence, the semaphore attendant, bring them habitually together, so that they could exercise a mutual influence upon each other, promotive of proper caution, *so as to make them co-employees in the same line of employment, as explained in defendant's instruction No. 1?*" The question as originally drawn by defendant's counsel did not contain the last clause, which is in italics. The italicized clause was added to the question by the court, and such modification of the question by the court is complained of as error. We cannot see that the defendant company was prejudiced by their referring the jury to its own instruction, prepared by its own counsel. They were not required by the modification to pass upon the law. They were merely told to answer the question of fact propounded to them in accordance with the principles of law laid down in the instruction. We find no error in the record. The judgment of the appellate court is affirmed.

CHICAGO, BURLINGTON AND QUINCY R. CO.

v.

CLARK *et al.*

(*Nebraska Supreme Court, May 31, 1889.*)

Master and Servant—Joint Defendants—Negligence—Pleading.—Where a petition charged several defendants jointly with operating a railroad construction train in a negligent and careless manner by negligently running it at a high rate of speed through a herd of cattle which were near the track over which the train was passing, whereby a part of the cattle which came onto the track were run over, and the train derailed and

thrown from the track, and by which the plaintiff, who was riding thereon, was injured, it was *held* that the district court did not err in overruling a motion to require a more specific statement in the petition by showing which one of the defendants was operating the road, if either one, or, if all, whether jointly or severally, which one employed the trainmen, and which was charged with the alleged negligence.

Same—Injuries—Evidence as to Speed of Cars—Competency.—It is not necessary to the admissibility of the testimony of a witness as to the rate of speed a train of cars was running at the time of an accident that such witness should be an expert in the matter of the speed of trains. Any person of sound mind and judgment, who has observed trains running, or other objects in motion, and who has an opinion thereon, based upon seeing the train at the time in question, is a competent witness upon the subject, the jury being the judges of the weight of his testimony.

Same—Negligence of Train Hands—Evidence as to Condition of Track.—In such action it was *held* not to be error for the trial court to permit the introduction of evidence tending to show the unsafe condition of the track at the place where the accident occurred, as tending to prove negligence on the part of those in charge of the train.

Same—Dangerous Speed—Presence of Cattle on Track.—An instruction in a case of the kind referred to, that it was negligence on the part of those in charge of the train to run it at full speed over any part of the track known by them to be frequented by cattle, unless that part of the track was guarded, *held* error.

Same—Construction Train—Employee of Contractor—Liability of Company.—Where a contractor undertook to lay the track upon a newly-constructed railroad for the railroad company owning or leasing the same, the company to furnish the construction train, and the men necessary to operate it, they to be employed and paid by the company, and to whom alone they are responsible while running the train, the contractor having no authority to control them in that behalf, it was *held* that if, by the carelessness of those in charge of the train while passing over the track, an employee of the contractor, lawfully on the train, and without fault or negligence on his part, was injured, the railroad company owning and controlling the movement of the train would be liable for the damages sustained.

Error to District Court, Lancaster County.

Marquette & Dewese for plaintiff in error.

Pound & Burr, G. M. Lambertson, and Sawyer & Snell for defendants in error.

REESE, C. J.—These several causes were instituted in the district court of Lancaster county against plaintiff in error. The issues were formed separately, but when they were called for trial they were consolidated and tried as one case; the jury returning separate verdicts in each case, which were all in favor of defendants in error and assessing to each the damages found due them. A motion for a new trial was filed, and upon the same being overruled judgment was rendered. The causes as consolidated are now brought to this court by proceedings in error. The issues formed in the district court were substantially the same in all the cases, and may be

briefly stated as follows: The actions were all against the Nebraska & Colorado R. Co., and John Fitzgerald and the Chicago, Burlington & Quincy R. Co. as defendants. It was alleged in the petition that the Nebraska & Colorado R. Co. was a corporation duly organized under and by virtue of the laws of the state of Nebraska, and that the defendant John Fitzgerald was the railroad contractor, and a resident citizen of the state of Nebraska; and that the Chicago, Burlington & Quincy R. Co. was a corporation duly organized and existing under the laws of the state of Illinois. That said defendants, on the 19th day of October, 1886, were engaged in the construction and completion of a railroad, and about two miles from the station of Deweese, in this state, the plaintiffs were employed by the defendant Fitzgerald at an agreed price of \$1.75 per day in laying track from the terminus mentioned into the station of Lawrence. That the said defendants were possessed of the locomotive, tender, and train of cars thereto attached, of about 16 in number, and at the time of the injuries complained of the railroad company referred to had in its employ and in charge and control of its train of cars a conductor, engineer, firemen, and two brakemen, who were running the train from about one mile from the said station of Lawrence to the said station of Deweese, at a high and dangerous rate of speed, and at not less than 30 miles per hour. Some of the cars were flat, some of them box-cars, and one water-car, one engine and tender; and which train was carelessly and negligently made up for that trip by said agents, servants and employees of the said railroad company, by running the engine backwards, and by placing the said engine in the middle of the train, with about 10 cars in front of said engine, and about 6 cars in the rear thereof, and with a box-car in front, towards the said station of Deweese, with no cow-catcher on in front of the train, and while carelessly and negligently running the train at the great rate of speed mentioned, by the wrongful act, neglect, and fault of defendants, while they were engaged in managing and conducting the business of the said defendants, and without fault on the part of the plaintiffs, ran into a herd of cattle near a high bridge, and the cars and all thereon in front of the engine were thrown down upon the ground below, a distance of about 20 feet, and by reason of which the plaintiffs were greatly injured, etc. The defendants in the action filed their motion for a more specific statement of the cause of action in the following particulars: (1) To show which one of the defendants was in possession of the railroad mentioned in the petition at the time complained of, or, if all were in possession of it, whether they held it jointly or severally. (2) Which one of the defendants was possessed of the locomotive, tender, and train of cars, and, if all were possessed of them,

whether jointly or severally. (3) State which one of the railroad companies had in its employ the conductor, fireman, engineer, and brakemen referred to in the petition. (4) To require the plaintiffs, when they state that the said railroad company was negligent through its agents and servants, to state which one of the railroad companies was referred to. (5) To require plaintiffs, when they state that the employees of said railroad company, or one of them, had charge and control of the said engine and train of cars, to state which railroad company was meant. This motion was overruled. The cause being presented on error by the Chicago, Burlington & Quincy R. Co. alone, against the several plaintiffs in the court below, the first assignment of error is the ruling of the district court upon the motion referred to. By the petition, the defendants in the action were jointly charged with the commission of the grievances referred to therein, and, so far as appears upon the face of said petition, each was equally and jointly liable. It was evidently the purpose of the pleader to so charge, knowing that the facts referred to in the motion were within the special knowledge and information of the defendants. The issues could be formed by answer, and, under the provisions of section 429 of the Civil Code, judgment might be rendered against either defendant found liable, if any liability existed. After the motion for a more specific statement of the petition was overruled the Nebraska & Colorado Railroad filed its separate answer, denying that it was the owner of the locomotive and train of cars referred to, or had any control or management over it. It also denied that the trainmen were in its employ or under its control, and alleged that no cause of action was stated against it. The Chicago, Burlington & Quincy R. Co. answered, alleging that it had leased the lines of the Nebraska & Colorado R. Co., and completed the construction of the same through a contractor, John Fitzgerald, the other defendant; that the line referred to in the petition was in process of construction, and the train of cars and employees operating the same were at the time of the accident complained of under the control and management of and subject to the orders of the said contractor, Fitzgerald; and alleging that whatever injuries the plaintiffs received on account of the accident referred to were received and incurred by them on account of their own negligence and carelessness, and not by reason of any fault of the said answering defendant; and alleging further that the petition set up no cause of action as against it. Fitzgerald filed his separate answer, admitting that he was the railroad contractor, and that the several plaintiffs were in his employ at the time of their injury. He also admitted the making up of the train, the collision, etc., and alleged that whatever injury the plaintiffs sustained was on account of their own carelessness and

gross negligence, and not through any fault of his. To these several answers replies were filed, and the cause proceeded to trial.

Upon the trial, defendants in error called a number of witnesses for the purpose of proving approximately the rate of speed at which the train was running at the time of the injury. Some of the witnesses so called were riding upon the train, others were not. None of them were experts in running trains. It is insisted that they were incompetent to testify, and that their evidence should not have been received. To this we cannot agree. The rate of speed at which a train is running is largely a matter of judgment from observation. While a person with an educated judgment upon that matter would be, perhaps, a more satisfactory witness than one uneducated, yet we know of no rule which would prohibit the uneducated person from testifying as to his judgment in the matter. *Detroit & M. R. Co. v. Van Steinberg*, 17 Mich. 99; *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512; *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Worthen v. Grand Trunk R. Co.*, 125 Mass. 99. The question is more as to the quality of the testimony than as to its competency; and this matter was properly left to the jury for their consideration.

It was shown upon the trial that plaintiff in error entered into a contract with Fitzgerald, by which he undertook to lay the track over that portion of the Nebraska & Colorado R. from Edgar to Blue Hill, a distance of 29 miles. The contract was in writing. By it the work was to be done under the direction of the engineer of plaintiff in error, who was in charge, and whose orders the contractor was bound to obey implicitly. It was also provided that plaintiff in error should furnish all necessary engines and cars, and the men to operate them. Aside from the contract, it was shown that, so far as the rate of speed was concerned, and the manner of running the construction-train, the conductor and his crew, who were the employees of plaintiff in error, acted independently of the contractor, his agents and servants; the conductor and crew being in the respect named responsible only to it. On the date named in the petition the track-laying had reached within about a half a mile of Lawrence, when the noon signal was given, and the work hands boarded the train for the purpose of returning to Deweese—which was the first station to the east—for dinner. On the way back, as the train approached a bridge of considerable height, it was observed that a herd of cattle were near the track on either side, a part of which sought to cross in front of the train, when they were struck, and a portion of the train derailed, and a number of cars, which were being "backed" by the engine,

and in and on which defendants in error were riding, were thrown from the bridge into the ravine below, the bridge being in part destroyed, and the injuries complained of received. Some evidence was introduced which tended to show the bad condition of the track over which the train passed just prior to the accident. This was objected to, and the objection was overruled, to which plaintiff in error excepted, and now assigns the ruling for error. In this we think the court did not err. It was alleged in the petition, and sought to be proved upon the trial, that the train was running at an unusually rapid and dangerous rate of speed, so that it was impossible to stop the train in time to avoid the collision. The evidence was competent for the purpose of showing negligence on the part of the employees of plaintiff in error at the time of the accident, a part of which was a dangerous rate of speed at which the train was running. As touching the question of negligence, the evidence was proper.

Upon the trial the court at the request of defendant in error gave the following instruction: "The jury are instructed that it is negligence for the employees of a railroad company, or of others having the control, management, and running of a railroad train having persons lawfully on board thereof to carry, to run such train at full speed over any part of its track known by such employees to be frequented by cattle, unless that part of the track is properly guarded." In permitting this instruction to go to the jury, we think the district court erred. There is no doubt but that it would have been competent to instruct the jury that, while running over that part of the track a greater degree of care should be taken than while passing over the other portions of the road perhaps, but we know of no rule which would require the track to be guarded; any other kind of care which would have secured safety would have been sufficient. Furthermore, the question of negligence was for the jury to decide under all the facts and circumstances proven.

**Dangerous
speed—Pres-
ence of cattle
on track.**

The only other question which it is deemed necessary to notice is as to the liability of plaintiff in error, assuming that all other necessary and essential ingredients of the case are proven. It is insisted that under the evidence Fitzgerald was an independent contractor, and under the rule laid down in *Hitte v. Republican Valley R. Co.*, 19 Neb. 620, plaintiff in error could not be liable. In that case Judge Cobb, in writing the opinion, says: "The said road was unfinished and being constructed at the time of the said injury; that the engine and cars by which said injury was inflicted were in the care and custody of, and were

**Contract for
construction
of road—Li-
ability of com-
pany.**

being run, operated, and managed by, the servants and hired men of the said John Fitzgerald, and not of the defendant (the railroad company)." Again, on page 624, it is said: "In the case at bar Fitzgerald was clearly an independent contractor. He had the use of the engine and cars of the defendant as a part of the consideration for the work performed by him; and if the engineer and fireman of the train which did the damage were borne upon the pay-rolls of the defendant while working on the contract, as claimed by counsel for plaintiff, which does not fully appear from the evidence, doubtless their compensation was fully accounted for by the contractor of the company. I conclude, therefore, that the train, consisting of an engine, tender, and one or two flat-cars, which struck and killed plaintiff's decedent, was not being run by nor under the control or management of the defendant company, and that the defendant is not bound to respond to any damage, if any, suffered through or by reason of the negligence of the engineer, conductor, or other persons in charge of the said train." In the case at bar we have an entirely different condition, so far as the management of running of the train was concerned. The contractor had no kind of authority over the train crew. They were responsible alone to the plaintiff in error. Had the contractor directed the conductor to "slow up" the train before running into the herd of cattle, the conductor was under no obligation to obey the order. Had he directed the train to run at a less rate of speed upon its return trip to Deweese, the conductor was under no kind of obligation to obey him. He had no more authority over the conductor than had any other person upon the ground, and therefore could not be held liable for the negligence of the trainmen; while, upon the other hand, plaintiff in error would be held liable for all injuries which might result by their negligence or want of care. *Thomp. Neg.* 892 et seq.; *Sproul v. Hemmingway*, 14 Pick. 1; *Fletcher v. Braddick*, 2 Bos. & P. (N. R.) 182; *Wood v. Cobb*, 13 Allen, 58; *De Forrest v. Wright*, 2 Mich. 368. Any other rule would place the contractor at the mercy of the servants of plaintiff in error in a matter in which he had no power or authority to control their actions.

The questions of the alleged negligence of plaintiff in error and of the alleged contributory negligence on the part of defendants in error are discussed to a considerable extent by the briefs of counsel, but, as a new trial must be had, and as these questions are for the consideration of a jury alone, under proper instruction, we do not deem it expedient to examine them at this time. For the error in giving the instruction referred to, the judgment of the district court is reversed, and the cause is

remanded for further proceeding according to law. The other judges concur.

Injuries to Servant—Derailment of Engine—Unexplained Cause.—When the cause of the derailment of a train is unexplained, it must, in an action to recover damages for the death of an employee, be regarded as one of the risks of the business, for which there is no liability. *Erie & W. V. R. Co. v. Smith*, Pa. Sup. Ct., April 8, 1889.

Same—Derailment—Notice of Defects in Track.—In an action to recover damages for the death of plaintiff's intestate through the derailment of a train, there was evidence that the defect in the track which caused the derailment had existed for three days at least before the accident, and had attracted the attention of a conductor, who had communicated the fact as to the condition of the track to the section boss. *Held*, that the evidence was sufficient to sustain a finding that the injury resulted from the negligence of the defendant in permitting the defect to continue after it was known to the employees in charge of the track and operating the railway. *Worden v. Humeston & S. R. Co.*, Iowa Sup. Ct., Dec. 21, 1888.

Same—Evidence—Wrongful Act of Third Person—Condition of Track.—In an action for damages for the wrongful death of plaintiff's intestate, the defendant pleaded that the derailment of the train which caused the death of the intestate was brought about by the wrongful act of third persons. *Held*, that the plaintiff might competently show that the topography of the country in the vicinity of the place where the derailment occurred was such as to render improbable the commission of a criminal act by reason of the open nature of the place. In such action, evidence as to the appearance and condition of a splice-bar found at the place of accident is admissible for the purpose of showing that it had been substituted for the one originally used. It is not error to permit the evidence of a witness as to a defect in the track to go to the jury, although he is unable to locate it at the exact spot where the accident occurred. *Worden v. Humeston & S. R. Co.*, Iowa Sup. Ct., Dec. 21, 1888.

Same—Damages—Expectation of Life—Evidence.—In an action for damages for negligently causing death, the "Encyclopædia Britannica," which contains the "Carlisle Life-tables," is admissible for the purpose of showing the expectation of life of the deceased, under a statute which provides that "historical works, books of science or art . . . are presumptive evidence of facts of general notoriety or interest." *Worden v. Humeston & S. R. Co.*, Iowa Sup. Ct., Dec. 21, 1888.

Same—Derailment—Evidence as to Defective Curves.—Plaintiff's intestate was killed in an accident in which the engine was derailed and overturned. It was claimed that the accident was caused by the engine mounting the rail. Plaintiff introduced evidence showing that the curves were defective; that in some instances they varied as much as 3 degrees; one witness testified that, although there were variations in all curves, the variation in the defendant's track was greater than he had seen in any other road. No evidence was offered to show that the mounting of the rail was caused by the defective curves, but on the other hand there was positive testimony that the same and other engines had constantly been running over the road, and that none had ever mounted the rail. *Held*, that it was error to submit the testimony as to the defective curves to the jury with an instruction they might find negligence on the part of the defendant sufficient to enable the plaintiff to recover. *Erie & W. V. R. Co. v. Smith*, Pa. Sup. Ct., April 8, 1889.

MISSOURI PACIFIC R. CO.

v.

McELYEA.

(Texas Supreme Court, October 12, 1889.)

Injuries to Servant—Defective Brake—Inspection—Evidence.—In an action for personal injuries caused by the derailment of an engine and tender, there was evidence which tended to show that the derailment was caused by a brake-shoe falling in advance of a car-wheel, which was thereby forced from the track; that, if the brake-shoe had been properly fastened, it could not have fallen; and that its fastening was so made as to render any defect therein easily observed. It was claimed that the engine and tender were both inspected a short time before the accident, but it was shown that, on that inspection, machinery constantly in sight of the engineer who made the inspection was not seen by him to be out of order, though a material part of it was missing. *Held*, that a verdict for the plaintiff, involving a finding that the machinery was defective, was sufficiently sustained by the evidence.

Same—Duty of Employer—Enforcement of Regulations.—A railway company cannot relieve itself from liability for an injury to an employee resulting from a failure on his part, through his agents, actually to use such care for the safety of employees as the law makes it necessary for a master to use, by making and enforcing regulations, unless the regulations be such, and their enforcement so complete, as to result in the actual use of due care.

APPEAL from District Court, Anderson County.

Action by A. J. McElyea against the Missouri Pacific R. Co. for damages for personal injuries alleged to have been received through defendant's negligence. The defendant appeals from a judgment for the plaintiff.

John Young Gooch for appellant.

W. Q. Reeves for appellee.

STAYTON, C. J.—The appellee was a "section boss" in the employment of the appellant company, and, with the men under his control, was being transported on an engine and tender from the section-house to a place on the road at which a wreck had occurred, when the engine and tender were derailed, and the appellee thereby seriously injured. The evidence tends to show that the derailment was caused by a brake-shoe falling from the brake-beam just in advance of a car-wheel, which was thereby forced from the track. The evidence further tends to show that, had the brake-shoe been properly fastened, it could not

Sufficiency of evidence as to defendant's negligence.

have fallen, and that its fastening is so made as to render any defect therein easily observed. It is claimed that the engine and tender were inspected but a short time before the accident, and that they were both then in good order; but there is evidence showing that on that inspection machinery constantly in sight of the engineer who made the inspection was not seen by him to be out of order, though a material part of it was missing. There was other evidence introduced tending to show that the engine was otherwise out of order, and was considered dangerous, and that it had left the track on several occasions but a short time before. It is urged that the evidence was not sufficient to sustain the verdict. There was much evidence, consisting mainly of statements that the engine and tender were in good order, and that they were frequently inspected, but all this was for the consideration of the jury; and, in view of the direct proof of defects, such as caused the accident and of the patent character of the defect found, we cannot say that the conclusion of the jury is not well sustained by the evidence, involving, as it does, the declarations that the machinery was defective; that the accident resulted from the defect; and that the exercise of that care required of the appellant for the safety of its employees would have prevented the accident.

It is urged that the court erred in refusing to give a charge asked by the appellant. The charge requested was as follows: "The defendant was under obligation to the plaintiff to use reasonable care to provide, and maintain in proper condition, a safe and suitable engine, road-bed, and other appointments, and is liable to him for an injury resulting from defects which were known to the company, or which were discoverable by reasonable care. But if the company exercised reasonable care by making and enforcing suitable regulations, which would ordinarily keep the machinery, road bed, and appointments in safe and proper condition, it is not liable for an injury resulting from defects in either. It does not warrant their completeness, nor warrant against defects, but it is bound to use only reasonable efforts to try to discover and repair defects. If it does this, it is not liable for a failure to discover or repair an unknown defect." The court below very carefully and correctly instructed the jury as to the degree of care necessary to be used by railway companies in the conduct of their business, and then proceeded to charge the jury as follows: "If you find from the evidence that the engine or tender, or both, upon which plaintiff was riding when hurt, was out of repair and defective, and that such condition resulted from a failure of the defendant to use the care hereinbefore defined as incumbent upon it, or that it was such that the defendant by the exercise of proper care ought to have discovered and reme-

Company liable for want of care although it makes and enforces regulations.

died it, and that as the proximate result of the defective condition of the engine and tender, or either of them, plaintiff received the injuries of which he complains, then plaintiff is entitled to recover; but if neither the engine or tender was defective plaintiff cannot recover, though they may have run off the track and hurt him; and again, if the engine or tender or both were defective, but if such defect was not the result of a want of proper care on the part of defendant, and if it was not such as the exercise of proper care by defendant would have discovered and remedied, then also defendant would not be liable." The charge of the court presented the law of the case clearly and fully upon all the points to which the refused charge related, and, if it had been strictly correct, the failure to give it would not be ground for reversal. The charge asked, however, would have relieved the appellant from liability if it exercised reasonable care in a named particular, i.e., in making and enforcing regulations which would ordinarily keep the machinery, road-bed, and appointments in safe and proper condition. A railway company cannot relieve itself from liability for an injury to an employee resulting from a failure on its part, through its agents, actually to use such care for the safety of employees as the law makes it necessary for such a master to use, by making and enforcing regulations, unless the regulations be such, and their enforcement so complete, as to result in the actual use of due care. Such a master may make rules and regulations for the conduct of its business and agents, who are in law deemed its representatives, as will ordinarily secure faithful service from such agents, and yet be responsible to an employee for injury resulting from a failure of such agent actually to use the care the law requires of the master. It may make regulations requiring the most rigid and frequent inspections of its machinery, road-bed, and equipments, and the most complete and prompt repair of any ascertained defect, and for a failure of its agent to comply with such regulations may make and enforce an absolute rule that a failure rigidly to comply with any of these regulations will be followed by the immediate discharge of the delinquent, and forfeiture of wages earned, or other penalty, and these regulations may be sufficient if rigidly enforced to secure ordinarily a faithful performance of duty; but if, notwithstanding such regulations and their enforcement, the agent, authorized to do what the master must do to avoid liability, fails to discharge his duty, then the master is liable to an employee who suffers injury through such neglect. The court did not err in refusing to give the charge requested. There is no error in the proceedings that led to the judgment, and it will be affirmed

SOUTHERN KANSAS R. CO.

v.

CROCKER.

(Kansas Supreme Court, June 7, 1889.)

Injuries to Servant—Defective Tools—Complaint as to Defect—Assumption of Risk.—While it is the fault of the servant, if he undertakes without sufficient skill, or applies less than the occasion requires, a section-man who complains of the bad condition of the tool with which he is to work, and is promised a new and good one, and is told to work with the defective tool until the others arrive, and, relying on such a promise, and there being no immediate danger, does so, and is injured by the use of the defective tool, is entitled to recover for the damages resulting. His solicitation of employment in a certain line of work is not an assertion that he can perform the labor with defective tools.

ERROR from District Court, Allen County.

Geo. R. Peck, A. A. Hurd, and A. B. Clark for plaintiff in error.

Knight & Frost for defendant in error.

SIMPSON, C.—Suit to recover damages for personal injuries received by the defendant in error in the line of his employment as a section hand of the Southern Kansas R. Co. Case stated. commenced on the 12th day of July, 1886. Tried at the March term, 1887, of the district court of Allen county, resulting in a judgment in favor of the defendant in error for \$2654.88. The defendant in error, Walter Crocker, was employed as a section-hand by the railroad company in August, 1885. He is a young man about 22 years of age, and before his employment by the plaintiff in error had never worked on any public works. From the time of his employment until the 30th day of March, 1886, he had been engaged in the ordinary duties of a section-hand, doing all that he was ordered to do, to keep the track in good repair. On the 30th day of March, 1886, in the afternoon, he was engaged in breaking rock for ballast, using for that purpose a stone-hammer that weighed three and one-half pounds. The handle of the hammer was a green stick, cut from the brush adjoining the track, and was crooked. The defendant in error had complained directly to the section foreman about the handle being defective; he having been slightly injured before by the use of such a handle. The foreman told

him to work with this one as it was, and that he would get good handles in a few days. He struck a blow on a lime-stone rock with the hammer, and a small particle of the stone struck him in the eye, and destroyed its sight. In two days after the injury the eye was taken out by oculists in Kansas City. The jury in answer to special interrogatories, find as follows: "(1) Was the plaintiff, at the time of his employment by the defendant, a man of ordinary intelligence and information? Answer. Yes. (2) How long had the plaintiff been in the employment of the defendant at the time of the injury complained of? A. About seven or eight months. (3) Did the plaintiff understand what he was expected to do under his employment, at the time he entered the service of the defendant? A. Yes. (4) How long had the plaintiff been engaged in the use of the stone-hammer in question before the day on which he was injured? A. About three or four days. (5) Was the plaintiff familiar with the use of the stone-hammer in question, at the time of the injury received by him? A. Yes. (6) Did the plaintiff know of all the defects, if any existed in the handle of the hammer he was using, at the time he worked with it, and at the time of the injury he received? A. Yes. (7) Could the plaintiff have put a new handle in the hammer-head if he had chosen so to do? A. No. (8) Was the plaintiff at work for the defendant by the day or by the month, at the time of his injury? A. By the day. (8) Was the work of breaking rock while in the employ of the defendant such work as the plaintiff was competent to do? A. Yes. (9) Which one of the three handles introduced in evidence is the one that plaintiff was using at the time a piece of rock flew off and hit him prior to the day on which he was hurt, as alleged in this case? A. Either Exhibit '2' or '3.' (10) Were the three hammer-handles introduced in evidence made by the workmen who were repairing the track and breaking rock with the plaintiff? [Objected.] A. Don't know. (11) Did the foreman, Neely Frame, give the men who made the three hammer-handles in evidence any directions as to the character of the handles that they should make? A. Don't know. (12) Did the foreman, Neely Frame, give the men who made the handles any instructions whatever as to the length, thickness, straightness, or elasticity of the handles they were to procure? A. Don't know. (13) How much, if anything, did you allow to the plaintiff for the services of the doctors in Kansas City? A. \$50. (14) How much, if anything, did you allow the plaintiff for the loss of time during period of time following the injury? A. \$100." The motion for a new trial was overruled, and the exceptions saved present the questions discussed by counsel for plaintiff in error.

1. There are only two. The first is that at the trial the defendant in error was allowed to testify that before he entered

the employment of the railroad company, in August, 1885, he had not labored on public works of any kind. It is said that this was a mere subterfuge to excuse the plaintiff's own carelessness and negligence; that the court, having allowed this to go to the jury, they had license thus given them to conclude that the plaintiff was not bound to exercise ordinary care and senses in doing the work. While we doubt very much whether any importance was attached to this evidence by either the court or jury, we will discuss it as if it was an important and controlling fact in the case. Giving the plaintiff in error the benefit of the ruling in the case of *Union Pac. R. Co. v. Estes*, 37 Kan. 715 to the fullest extent, and holding that his employment as a section-hand was an assertion on his part that he could break stone for ballast, and the result is that the company would not be liable for any accidental injury that happened in the line of that employment. This is upon the theory that the company furnished him with the usual tools that were used to do such work, and that these tools were in good condition. But his employment was not an assertion on his part that he could break rock for ballast with stone-hammers with crooked handles. The record shows that he had complained of the hammers, and the foreman had promised to procure new and better handles. The duty of the company is plainly understood to be to furnish reasonably safe tools for doing this kind of work. These hammers were defective. A protest was made against their use; a promise given that good new handles would be forthcoming; and this promise was accompanied by an order "to go ahead and work with them." The work proceeded, and the injury was the result of the use of the defective handle of the hammer. The conclusion is irresistible that the railroad company did not exercise that degree of care required by law in furnishing proper tools with which to do the work required of the section-men, and was guilty of negligence in requiring the use of defective hammers.

Duty of company as to tools furnished.

2. The other objection is confined to the answers to the seventh and tenth special questions submitted to the jury. We do not deem these very important or influential in determining the result. If the answer to these questions had been "Yes," they would not have changed the result; neither would these answers have been inconsistent with the general verdict of the jury. Was it the duty of the defendant in error, under the terms of his employment, to put a new handle in the hammer-head? If it was, the foreman ought to have ordered him to do so when he complained of the defect; but instead of that, he was told to go ahead and work with it until the new one arrived. Again, what difference does it make who made the handles that were used? the natural inquiry being whether or not they were

reasonably adapted to their use, and were safe. We have read this record carefully, and, with the exception of the evidence of the witness Lorange, there is no testimony to show that two of the handles were made by the workmen. Lorange says he made one of them, but as to the other two it is not disclosed who made them. The answer in this respect is truthful. However, no matter how the question is answered, we regard it as an immaterial matter, for if it was the duty of the workmen to make them they must make good and safe ones.

3. This case was fairly tried. The railroad company produced no evidence. There are no exceptions to the instructions of the court.

These two immaterial matters are the only complaints made. The verdict and the means by which it was arrived at are approved by a trial judge who is unusually careful and considerate, and justice requires that such a verdict should not be lightly disposed of. Having no doubt but that substantial justice has been done, we recommend that the judgment be affirmed.

PER CURIAM.—It is so ordered; all the justices concurring.

ANDERSON

v.

MINNESOTA AND NORTHWESTERN R. CO.

(Minnesota Supreme Court, December 21, 1888.)

Injuries to Servant—Hand-car—Duty of Employer—Inspection and Repair.—In an action for damages resulting from the defective condition of a hand-car upon which plaintiff worked as an employee of the defendant, regard must be had to the risks and dangers attending the use of the instrumentalities furnished the servant in his employment, in determining the question of reasonable care on the part of the master; and the obligation of the master as respects due care, extends as well to the matter of inspection and repair as to furnishing.

Same—Duty of Servant—Assumption of Risks.—The servant is bound to exercise care on his part against danger and accident commensurate with the risk to which he is subjected in his employment; and such defects in an instrument which he has frequently used as are obvious to the senses or with reasonable diligence ought to be discovered or known by him, he will be held to take the risk of.

Same—Hand-car—Defective Handle—Evidence of Negligence.—Plaintiff, a section-hand, was injured whilst operating a hand-car, through the

breaking of the handle. It appeared that there was a knot in the wood at or near the place where it broke, which caused a deflection in the grain of the wood under the clasp. It was fastened in the clasp by screws or nails passing into the wood. It had been so fastened a second time, and there was, under the band, a second nail-hole well worn extending through the wood at the place where it broke. There was testimony to the effect that the handle was weakened by the presence of the knot and nail-hole. *Held*, that there was evidence sufficient to warrant a finding that the handle was unsafe for the purpose to which it was applied, and that it was for the jury to determine whether the defendant was negligent in permitting such a piece of wood to be used for a car-handle or in suffering it to remain in use.

Same—Contributory Negligence—Discovery of Defect—Question for Jury.—Under such circumstances, it was also for the jury to determine whether the plaintiff by the exercise of reasonable diligence might have discovered the character and extent of the defect, and must therefore be held to have assumed the risk arising therefrom.

GILFILLAN, C. J., and MITCHELL, J., dissenting.

APPEAL from District Court, Dodge County.

Action by C. S. Anderson against the Minnesota & Northwestern R. Co. to recover damages for personal injuries. The defendant appeals from a judgment for the plaintiff.

Lusk & Bunn for appellant.

Geo. B. Edgerton and *Davis, Kellogg & Severance* for respondent.

VANDERBURGH, J.—A new trial was asked for by defendant on the ground that the verdict in plaintiff's favor was not justified by the evidence, and the refusal of the trial court to grant the application is the ground of this appeal.

Facts.

The plaintiff was in the employ of the defendant, and was one of a gang of section-men, seven or eight in number, including their foreman. They had charge of a hand-car, which they used in their business to transport themselves and their tools to and from different points on the section of the railroad upon which they worked. At the time of the injury complained of, they were returning on the car from their work, and the men were all engaged in operating it,—three on one side, and four, including the plaintiff, on the other. The car was moving up grade, and against the wind, and it required vigorous exertion to drive it forward. While so working under the direction of the foreman, that portion of the wooden handle which plaintiff held parted at the iron clasp or ring through which it was passed to work the levers in operating the car, and he was suddenly precipitated forward on the track, and was run over and seriously injured, and he now seeks to recover damages against the defendant for its alleged negligence in not providing a safer instrument to work with.

I. The evidence tends to prove that the handle was too weak

for the strain required and put upon it, and the use to which it was applied. There was a knot in the wood at or very near the place where it broke, which caused a deflection in the grain of the wood under the clasp, which some of the witnesses testify was a defect in the handle which weakened it. It was fastened in the clasps or bands at the ends of the iron levers by screws or nails passing through into the wood. This handle, it appears, had been so fastened a second time, and there was under the band a second nail-hole, well worn, extending through the wood at the place where it broke, which the jury might also find tended to weaken the handle at that point. In such cases, in determining the question of reasonable care, regard must be had to the particular use to which the instrumentality furnished is to be applied, and the risks and dangers attending such use, and the obligation of the master extends as well to the matter of examination and repair as to furnishing. The jury had before them the two parts of the broken handle, and some of the witnesses—experienced railroad hands, competent to speak on the subject—testified that the knot made the handle defective; and, among other things, that it was not a first-class handle; “that the grain ran out at the edge of the knot,” and “weakened the stick;” “the crooked grain around the knot weakens it a great deal.” A carpenter, familiar with different kinds of wood, testified: “I don’t think it would have broke in that way if there had not been a knot there. I think it turned the grain by the knot being there.” One of the witnesses also testified that the nail and screw-hole weakened it. There is no doubt that there was evidence enough to warrant the jury in finding the handle unsafe for the purpose to which it was applied. The only question of serious doubt or difficulty is whether the defendant was negligent in permitting such a piece of wood to be used for a car handle, or in suffering it to remain in use so long. The nature of the business, and the dangers attending the use of the car, required a corresponding degree of care on the part of the defendant in guarding against accidents from defects in the same. And we think it was for the jury to determine whether such care was exercised in this case, upon the evidence of the witnesses as to the nature of the defects in the handle, the length of time it had been in use, the nature and appearance of the defects, and the manner it had been repaired, and the condition it was in at and previous to the time of the accident. The evidence tends to show that it was the duty of the foreman, who had the car constantly in charge, to see that it was kept in repair, and furnished with new handles, when necessary. He represented the master, and if (as upon the evidence the jury might find) the repairs have been so carelessly made in fastening

the handle as to render it unsafe, or if the other defects testified to were such as to weaken it, and as were discoverable by reasonable diligence, the defendant is chargeable with knowledge thereof, and responsible for the consequences resulting therefrom.

2. Though the plaintiff may not have been charged with the duty and responsibility of inspecting or repairing the car except as he might from time to time be directed by the foreman, yet he was undoubtedly bound to exercise care commensurate with the risks to which he was subjected in his employment; and such defects in an instrument which he was frequently using as were obvious to the senses, or with reasonable diligence, considering the circumstances and nature of his employment, ought to be discovered or known by him, he must be held to take the risk of. In this case the car had been in use there about six months. The accident occurred the latter part of May. The plaintiff had worked with the car the fall before, and about two months in the spring next preceding the accident, but was absent during the winter. The evidence in his behalf tended to show that he was a track laborer, acting under the immediate supervision of the section foreman, who was charged with the responsibility for the car and its condition, and that it was the duty of the latter to attend to the inspection and repairs thereof. It does not appear that plaintiff worked with one handle more than the other, nor that it was his duty to inspect or repair the same. Plaintiff denies that he had any notice of the defect complained of, and it does not appear that he knew of the extra nails that had been used to fasten the handle, or that it had been turned and refastened while he was working with the car. The jury were informed by the evidence of the nature of his work and duties, saw and examined the stick that was broken, and heard the evidence of the witnesses as to the nature of the defect; and upon the whole record we are not prepared to say that the trial court erred in submitting to them the question whether his ignorance of the character and extent of the defect was attributable to want of reasonable diligence on his part. Order affirmed.

Whether plaintiff might have discovered defects a question for the jury.

GILFILLAN, C. J., and MITCHELL, J. (*dissenting*). We dissent, because in our opinion the evidence was not sufficient to justify a finding of negligence on the part of defendant.

Master and Servant—Relative Duties—Contributory Negligence.—An employer impliedly engages to make the service of the employed a reasonably safe one. When acting through agents, he undertakes that his agent shall be a capable person for the position he holds. He shall provide a safe place for the employee to work at or upon, and no order with respect to change of position of the subject of the work shall be executed without due warning to the employee. If the employee has timely warning, and

does not act upon it, he takes the risk of danger upon himself. When the plaintiff is guilty of the slightest contributory negligence, and the injury is not wholly the fault of the defendant, he cannot recover. In order to hold the employer responsible for the act or omission of his agents, where rights of others are concerned, such act or omission must be satisfactorily proved, and it must also appear that the plaintiff was not guilty of any contributory negligence. *Stewart v. Philadelphia, W. & B. R. Co.*, Del. Super. Ct., May 24, 1889.

Injuries to Servant—Hand-car—Negligence of Company in permitting Use of Defective Handle.—Whilst plaintiff was engaged with others in operating a hand-car, the handle broke at the socket, causing him to fall backwards in front of the car. The broken lever was of pine timber, and, at the break, which was at the place penetrated by the nail or bolt, the wood was discolored showing decay and evidence of a partial old break. Outside the socket there was no evident defect. There was testimony that oak and hickory were the best qualities of wood for the purpose, but that pine was in common use and had sufficient strength. Defendant's evidence was to the effect that the car was new and the handle apparently good. *Held*, that the question whether the defendant by the exercise of ordinary care might have ascertained the condition of the lever and was consequently liable, was for the jury, and that a verdict for the plaintiff would not be disturbed. *Gulf, C. & S. F. R. Co. v. Silliphant*, 70 Tex. 623.

Same—Hand-car—Instruction as to Opportunities of Plaintiff to discover Defects—Risks Assumed.—In an action for injuries caused by the breaking of the handle of a hand-car, a charge that if the opportunities of the plaintiff and of the defendant were equal to ascertain the defect, plaintiff cannot recover, is properly refused when it appears that the break was out of sight, that the plaintiff had been newly employed, and that, therefore, he had no opportunity for ascertaining the condition of the handle. In such action, a charge that a person taking employment is presumed to have requisite skill and knowledge for the employment and to assume the ordinary dangers of the employment, is properly refused, the rule being that employees are presumed to take the risks incident to their work, and not those arising from the employer's negligence. *Gulf, C. & S. F. R. Co. v. Silliphant*, 70 Tex. 623.

Same—Hand-car—Relative Duties and Responsibilities of Master and Servant.—In an action for damages for injuries caused by the breaking of the handle of a hand-car, it is not erroneous to charge in effect that it is the duty of a railway company to furnish reasonably safe machinery to its employees, and to use reasonable diligence to see that it is kept in a reasonably safe condition; that if an employee knows that the machinery furnished him is defective and unsafe, and undertakes to use it, he is guilty of negligence; that if the defendant by the exercise of reasonable care could have detected the hidden defects, it is liable although the defects were unknown to it; and that if the plaintiff did not know of the defects in the handle, he was not guilty of contributory negligence. *Gulf, C. & S. F. R. Co. v. Silliphant*, 70 Tex. 623.

SONGSTAD

v.

BURLINGTON, CEDAR RAPIDS AND NORTHERN R. CO.

(Dakota Supreme Court, February 9, 1889.)

Injuries to Servant—Negligence—Sufficiency of Evidence—Risks of Employment.—Plaintiff, a shoveller, was injured while engaged in loading cars from a gravel-pit under the direction of the defendant's foreman. An embankment of earth 12 to 13 feet high had been formed by the removal of gravel under it and was frozen. The foreman, with the knowledge of the respondent, attempted to pry the bank down. While he was doing so, plaintiff selected a place for continuing his work from which he could see the foreman, and which he considered safe though the bank should fall. As the bank began to fall, plaintiff attempted to retreat, but stumbled over a clod of earth, fell, was caught by the falling earth and his leg broken. *Held*, that no negligence on the part of the defendant or its foreman had been shown, and that the accident was one of the risks of employment assumed by plaintiff. PALMER, J., dissenting.

APPEAL from District Court, Minnehaha County.

Appeal from a judgment of the district court of Minnehaha county, entered upon a verdict, and from an order overruling motion for new trial. The action was brought to recover damages alleged to have been sustained by the respondent by reason of the negligence of the appellant. The respondent was in the employ of appellant in the capacity of a shoveller, and at the time he received the injuries complained of was engaged in loading cars from a gravel-pit, under the direction of respondent's foreman. An embankment of earth had been formed by the removal of gravel under it, 12 or 13 feet high, and was frozen. The foreman, with the knowledge of the respondent, attempted to pry the bank down. While the foreman was thus engaged, the respondent selected a place for continuing his work, from which place the foreman was in full view as he worked, and which he considered far enough removed from the bank, though it should fall, to insure his safety. As the bank began to fall the respondent attempted to retreat further, and stumbled over a clod of earth and fell, and was caught by the falling earth, and his leg broken. To recover the damages caused thereby this action was brought. At the close of plaintiff's case the appellants moved the court to direct a verdict for defendant on the ground that there was not sufficient evidence to support a verdict for the plaintiff, which motion was overruled. A similar motion was made after the evidence was

Facts.

closed, and again denied; to each of which rulings appellant excepted. The respondent had a verdict, and, after motion for new trial on behalf of appellant was denied, judgment was duly entered for plaintiff, from which appellant appealed, assigning each of the rulings aforesaid as errors. The other material facts are stated in the opinion.

Boyce & Boyce and *S. K. Tracy* for appellant.

Parlman & Stoddard for respondent.

SPENCER, J.—The evidence in this action, when construed most favorably to the plaintiff, discloses that in November, 1885, he engaged his services to the defendant as a laborer; that he and a considerable number of other men were at work under the supervision of one Mahoney, as foreman, in the work of shovelling gravel from a gravel bed or bank onto a train of platform cars, which, when loaded, were drawn to Sioux Falls, a distance of a few miles, emptied, and returned to the pit for the purpose of being reloaded; that the plaintiff had been thus engaged 10 days or more when the accident complained of occurred; that about November 25, 1885, an overhanging bank of the gravel-pit, 12 or 13 feet high, having been produced by the removal of gravel under and adjacent to it, was attempted to be pried down by the foreman, who for that purpose went upon the bank with a bar, and commenced prying, having first given the men in his charge notice of what he was about to do. The plaintiff and the other men at work heard the warning, and stopped working for a few moments, and watched the foreman's efforts to pry down the bank. The bank failing to yield to his efforts, the foreman told the men to proceed with their work. The foreman continued his efforts to break down the bank, and the plaintiff returned to his labors at a point from which he could see him (the foreman); and when he supposed he was in a place of safety, to use his language, "We went to work again. In the mean time, while I was yet at work, the boss was breaking on that piece upon the bank. . . . I thought we were so far away from the cut, we were out of the way. I thought sure it could not hurt me. Then I saw it come,—I saw the bank come down. I was trying to get back. There was a big chunk lying in the way. I got one foot out of the way, but the other got caught. I ran against this chunk behind me, and fell down on it. Then I tried to get my leg out, and I could not do it. . . . They broke out the dirt above my leg, and got it loose. Then I saw it was broken. The chunk that fell on my leg and broke it came from the top of the bank,—the piece he broke down. I did not hear him tell us to look out any more after he told us to go to work. When the bank broke, he hollered, 'Look out!' . . . There

Evidence as to
occurrence of
accident.

were about twenty men employed there loading trains with gravel. These men were all working under Dan. Mahoney as foreman. He would help get the gravel and dirt down to load the trains. Mahoney was up on top of the bank just before I got hurt. He was trying to pry down the top of the bank. I saw him there. He would take the crow-bar and pry off the top of the bank, and push it down. I saw him pushing the frozen dirt off. I thought I was far enough away. When it came down, I stepped backwards, and struck the frozen clod that was lying there, and fell over. The part that fell down there struck me after I fell down there. That is the way the accident happened. Mahoney would tell us when to shovel. He did not exactly say which place we should shovel; told us to go around the cars, and go to work. He would tell us to load the train. I believe he did sometimes take a hand himself in loading, and at other times he would pry down the bank for us to load what he pried down." The train being loaded at the time of the accident comprised 14 cars.

This was substantially all the evidence in the case in favor of the plaintiff's right to recover, and it is obvious that it wholly fails to establish negligence on the part of the appellant. There is no pretence that Mahoney was not an entirely competent person for foreman, or that the defendant was guilty of any negligence in engaging his services in the capacity in which he was employed. Was the foreman himself negligent? It will not be pretended that it was negligence in him going upon the bank, and attempting to break it down, especially as he gave warning to the men in his charge, which the plaintiff understood, that he was about to do so. Nor can it rightfully be said that his negligence in continuing his efforts to pry off the bank, after directing the men to return to work, and without informing them that he was doing so, was negligence to this plaintiff, or that it resulted in the injuries complained of. He did not ask them, or any of them, to work in any place of peril, but merely to load the train. The plaintiff evidently did not understand that he was to work under or in such close proximity to the overhanging bank as to endanger his safety. On the contrary, when he returned to his work he took his place, as he says himself, not very near to the bank, but at some distance from it; so much removed from it, that he believed it was to him a place of safety, and, though it might fall, as it did, it could not reach him. He was fully acquainted with the circumstances and the condition of the pit; had been constantly employed there for many days preceding the accident; and, of his own judgment, and without let or hindrance, selected a place at which to perform his work.

Evidence held
to be insuffi-
cient to show
negligence.

There was therefore no negligence proven on the part of the defendant or the foreman.

Another sufficient defence under the facts as established by the evidence in behalf of the plaintiff is that the injured plaintiff assumed risk of accident. The jury complained of was one of the ordinary risks which he assumed when he engaged his services to the defendant, in the business which he undertook. He was a person of usual intelligence, in possession of all his faculties. He was entirely familiar with the gravel-pit, the height of the embankment, and the effect of the thawing frost upon it; also that the foreman and conductor were trying to pry it down. He saw them at work, and understood the situation in all respects; and notwithstanding it was fraught with danger to a greater or less extent (and this it was, to his own knowledge), he assented to incur the dangers to which he was thereby exposed, and proceeded with his work. It is difficult to perceive in this case that any precautions for his safety had been neglected, but, if they had, having consented to serve in the way and manner in which the business was being conducted, with full knowledge thereof on his part, he cannot now be heard to complain. The following cases are analogous to the one at bar, and fully sustain the respondent's contention. *Naylor v. Chicago & N. R. Co.*, 53 Wis. 664, 5 Am. & Eng. R. Cas. 460; *Sullivan v. India Manufacturing Co.*, 113 Mass. 396; *Olson v. McMullen*, 34 Minn. 94; *Galveston, etc., R. Co. v. Lempe*, 11 Am. & Eng. R. Cas. 201; *Leonard v. Collins*, 70 N. Y. 90. The trial court erred in denying respondent's motion for direction of a verdict in its favor, and in overruling its motion for a new trial. The judgment must therefore be reversed, and a new trial ordered. Judgment reversed.

All concur, except Justice PALMER, dissenting.

COLUMBUS AND WESTERN R. CO.

v.

BRADFORD.

(*Alabama Supreme Court, May 18, 1889.*)

Injuries to Servant—Pleading—Averment of Absence of Contributory Negligence.—It is not necessary to aver the absence of contributory negligence on the part of plaintiff or deceased in a complaint in an action brought under sections 2520–2592, Ala. Code, which make the employer liable for the negligence of fellow-servants in certain cases, unless the person injured

knew of the defect or negligence which caused the injury and failed to communicate his knowledge to his employer.

Same—Death—Right of Action—Personal Representatives.—An action under the Alabama Employers' Act of 1885 is properly instituted by the personal representative of a deceased railroad employee, and it is not necessary to aver that the intestate left surviving him any heirs at law.

Same—Contributory Negligence—Failure to Avoid Danger—Disobedience to Orders.—Plaintiff's intestate, a stone-mason, while working on a stone for use in the construction of a bridge, was told by the foreman to keep out of the way of trains. He accordingly left his work and went to a safe place whilst two trains passed. The third time a train passed, the standard of a car, which had slipped partially through its socket, struck the stone, turned it around and caught and crushed the deceased. *Held*, that as he had failed to avoid an obvious danger as directed by his foreman, he was guilty of such contributory negligence as precluded a recovery.

Same—Contributory Negligence—Province of Court and Jury.—When the evidence which supports the state of facts from which the inference of contributory negligence is drawn, is without contradiction and free from any adverse criticisms, the question of contributory negligence *vel non* is a question of law for the decision of the court.

APPEAL from Circuit Court, Tallapoosa County.

Action by the administrator of John Bradford, a stone-mason employed by the defendant, the Columbus & Western R. Co., to recover damages for negligently killing plaintiff's intestate. The second special charge requested by the defendant was as follows: "If the jury believe from the evidence that the intestate, John Bradford, was an employee of the defendant and was laboring under the direction of O. Prather, and that the said O. Prather had removed the stone so that the train could pass unobstructed on the track, and if the said Prather, as an additional precaution of safety to the intestate, directed him, as an employee, to leave the place when a train was passing, and if the jury further believe that the said John Bradford saw the car when it approached, and expressed the opinion that the standard of said car would strike the stone, and said John Bradford remained and was struck and crushed by said stone, then such conduct of the said Bradford was such fault and negligence on his part as would preclude the plaintiff from recovering damages of the defendant in this case." The court having refused to give this charge, the defendant excepted. The jury returned a verdict for the plaintiff. Defendant appeals.

George P. Harrison, Jr., for appellant.

W. J. Samford and *W. D. Bulger* for appellee.

MCCLELLAN, J.—The liability of a master or employer for injuries to an employee at common law was limited to those cases in which the damages claimed resulted from the negligence of the master or employer himself, or some employee higher in authority in the common service than the plaintiff, as distinguished from the negligence of

Liability of
employer at
common law.

fellow-employees bearing the same or inferior relations to the master as those borne by the party injured. To an action for injuries sustained through the fault of the employer or superior employee, it was a good defence that the complaining employee had, by failing to exercise due care, contributed to the result of which he complained. Contributory negligence, which would defeat an action, might have consisted of a failure on the part of the plaintiff, either to reasonably give notice of the defect in appliances used in his employment, or of the negligence of his superiors, if known to him, which produced the injury; or, having given such notice, to quit the service to which such defect or negligence was incident after a reasonable time had elapsed for its correction.

The "Employers' Act" of 1885, now, with slight changes in verbiage and arrangement, constituting sections 2590, 2591, and 2592 of the Code, enlarged the liability of the master by extending it to cases in which the injury had resulted, under certain circumstances and conditions, from the negligence of fellow-employees. The existing law was supposed to fall short of the attainment of justice in that, and only in that, no action was allowed for the negligence of a certain class of persons. The statutory purpose was to charge the master for the negligence of this class of persons in his employment in the same manner, under like conditions, and to the same extent, as he was before charged for his own negligence, or that of superior employees. In the effectuation of this purpose, it became necessary to go further than a mere declaration of liability for the negligence of the fellow-servants of the plaintiff, and to guard against a construction of that declaration which would give to the employees redress for the fault of their co-employees, to which they would not have been entitled for that of the employer, or of a superior servant of the common master. To this end—to preserve to the master the same defence against the negligence of his servants as he had against the consequences of his own carelessness—the legislature declared that he should not be liable if the complaining employee knew of the defect or negligence which caused the injury, and, that not being aware that the fact was already known to the master or some person superior in authority, failed to communicate his knowledge to the employer or superior employee. This provision of the statute, therefore, relates to purely defensive matter,—the contributory negligence of the plaintiff,—which, in this case, was properly omitted from the complaint, and left to be brought to the attention of the court by plea. *Thompson v. Duncan.* 76 Ala. 334; *Montgomery & E. R. Co. v. Chambers,*

Action under
"Employers'
Act"—Aver-
ments as to
contributory
negligence.

79 Ala. 338; *Wilson v. Louisville & N. R. Co.*, 85 Ala. 273; *Mobile & B. R. Co. v. Holborn*, 84 Ala. 133; *Columbus & W. R. Co. v. Bridges* (Ala.), 5 South. Rep. 864. The demurrers to the third, fourth, and fifth counts of the complaint, which are framed under or with reference to section 2590 of the Code, so far as they are predicated upon the failure of these counts to negative this species of contributory negligence, were properly overruled.

What is here said, however, must not be understood as having any application to the last clause of section 2590, which provides that the master or employer shall not be "liable under subdivision 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition." This provision manifestly relates, not to defensive matter, but to the negligence of the defendant, and facts would probably have to be averred in the complaint, if drawn under the first clause of the section, which would show that the defect causing the injury was within these limitations. As this point does not arise in the case at bar, however, it is not decided.

The suit was properly instituted by the personal representative of the deceased employee, and it was unnecessary to allege that the intestate left surviving him any heirs at law. A collateral fact of this character, the existence of which in almost all cases is common knowledge, will be presumed. *Thompson v. Duncan*, 76 Ala. 334.

Suit properly
brought by
personal rep-
resentative.

The first count of the complaint is good under section 2589 of the Code, in connection with the common-law liability of the master to his servants and to strangers for his own negligence. The sixth count (even if some defects, which are so patent as to justify their being treated as clerical misprisions, be not considered) is bad, but none of the demurrers reach the point of its infirmity. The third, fourth, and fifth counts, we think, sufficiently aver the facts necessary to constitute liability under one or the other of the last three subdivisions of section 2590. We therefore hold that the action of the court below, in overruling the several demurrers to the complaint, was free from error.

The defendant pleaded the general issue, contributory negligence, and several other special pleas in denial of a right of recovery under each count of the complaint, on all of which issue was joined on all of the pleas.

The evidence necessary to an understanding of the opinion of

the court may be stated as follows: Plaintiff's intestate was in the employment of the defendant as a stone-mason, under the control of one Prather. At the time of the injury he was working on a large stone, intended for use in defendant's bridge over the Tallapoosa river. This stone had been, under the direction and with the assistance of Prather, placed between a spur track of defendant's road and an embankment. The embankment was seven or eight feet in height, and nearly perpendicular, or, as testified, "cut pretty square down." The space between the ends of the ties under the track and the foot of the bank was from four to six feet. This space continued along the length of the spur track, but at some distance west of the point at which the stone was placed it was obstructed by timbers. The distance between these timbers and the stone is variously stated by the witnesses at from eighteen feet to twenty yards. After the stone had been placed in this position, Prather remained there until a train had passed in on the spur track and out again without striking the stone. As the train passed and repassed, Prather and the intestate and another employee left the stone; Prather and the other employee going to the other side of the track, and the deceased towards the end of the switch. Prather then left, telling the deceased and the other employee that "you must get out of the way when a train comes in here," as testified by one witness, or, according to another, "keep out of the way of the train." A half hour afterwards the train returned, and again passed in on the spur track, going beyond the stone, but without striking it. This time the other employee (one Oliver) went, as before, to the other side of the spur track, and intestate again went back towards the end of the switch. While the train remained on the spur track, the intestate and Oliver resumed work on the stone, and were so engaged when the train started out again; Oliver working on the end of the stone next to train, and facing west, and the intestate at the other end, facing east towards the approaching train. While thus engaged, and while the train was passing the stone, the intestate remarked to Oliver, according to one witness, "I believe that standard will strike this rock," or, as stated by another, "The standard is going to hit the stone." Oliver turned, and saw that a standard had slipped partially through its socket, and extended below the body of the car. The standard, when Oliver first saw it, was from 20 to 30 feet from the stone, and the train was moving very slowly. The train proceeded; the standard struck the stone, turned it around; and the intestate was caught between it and a plank standing against the embankment, and so badly crushed that he died a few hours afterwards.

Whatever else the evidence may tend to show, it cannot be

gainsaid that the deceased and one Prather were in the common employment of defendant; that the nature and terms of their respective employments and duties made Prather the superior of Bradford, and bound the latter to obey the orders and directions of the former; that these instructions, with respect to the work on which deceased was engaged at the time of the accident, were that he should prosecute that work, except when a train should come in on the spur track, along which the stone had been placed, and that when a train should come in on that track, he should desist from the work, and get out of the way of the cars. These directions could not have been misunderstood. What was meant by them was illustrated by Prather's act in leaving the stone, and crossing over to the other side of the track, when the train first passed in and out. Bradford could not have considered that they were not meant to apply after it had been shown that a train normally appointed would not collide with the stone in passing, because they were given after this had been demonstrated. It was shown that he did not so interpret them by the fact that he left the place the third time the train passed. It is not pretended that he could not or did not see the train, as it approached the fourth and last time. It is not hinted that there was anything whatever to prevent a like compliance with this order on this last occasion as on the three former ones. On the contrary, the proof is positive that he could and did see the train, and could without difficulty, or even inconvenience, have complied with the order, and by compliance have assured his safety. His failure to do, under the circumstances, left him in a position in which the defendant owed him no duty of protection further than would result from the absence of gross negligence or recklessness, and there is nothing in the case tending to show either. Aside from a consideration of the evidence of contributory negligence, strictly speaking, on the part of the employee, he was where he had no right or business to be. The theory of the complaint, which in every aspect predicates the right of recovery on the assumption that the plaintiff's intestate was rightfully at the place of the accident, therefore, falls to the ground. The case has not been made out; and on these considerations alone the general charge for the defendant should have been given. *Pfeiffer v. Ringler*, 12 Daly (N. Y.) 437; *Wright v. Rawson*, 52 Iowa, 329.

Plaintiff having disobeyed orders cannot recover.

But our conclusion need not be rested here. The conduct of the plaintiff's intestate was not that of a prudent, careful man. He did not exercise that degree of caution and diligence which a prudent and careful man, similarly situated, would have exercised. He was warned of the danger. Not only so, but he was ordered

Plaintiff held to be guilty of contributory negligence.

away from the point of danger by one whose directions it was his duty to conform to. There was nothing to prevent his avoiding the danger. His avenue of escape was pointed out to him, and was entirely feasible and easy. Had he availed himself of it, he would not have been injured. His failure to avail himself of it was the result of forgetfulness, inattention, carelessness, or recklessness, but for which he would not have been injured, and which, therefore, gross negligence not being imputed to the defendant, contributed proximately to the injury; and, the plaintiff being charged with the negligence of his intestate, he was not entitled to recover; and this notwithstanding there may have been negligence on the part of the defendant or its other employees. *Lilley v. Fletcher*, 81 Ala. 234; *Montgomery & M. R. Co. v. Thompson*, 77 Ala. 458; *Campbell v. Lunsford*, 83 Ala. 512; *Woodward Iron Co. v. Jones*, 80 Ala. 123; *Wilson v. Louisville & N. R. Co.*, 85 Ala. 269; *Prather v. Richmond & D. R. Co.*, 9 S. E. Rep. 530; *Central R. Co. v. Mitchell*, 63 Ga. 173, 1 Am. & Eng. R. Cas. 145; *Atlantic & C. A. R. Co. v. Ray*, 70 Ga. 674, 22 Am. & Eng. R. Cas. 281.

The evidence in this case, which supports the state of facts from which the inference of contributory negligence is drawn, is without contradiction, and free from any adverse inferences. In such case the question of contributory negligence *vel non* becomes one of law, and is for the decision of the court. *Wilson v. Louisville & N. R. Co.*, *supra*; *Ala. G. S. R. Co. v. Jones*, 71 Ala. 487, 15 Am. & Eng. R. Cas. 549; *East Tenn., V. & G. R. Co. v. Bayliss*, 74 Ala. 150, 19 Am. & Eng. R. Cas. 480. On this principle, the court below should not have submitted the question of contributory negligence to the jury, but should have instructed them to return a verdict for the defendant, if they believed the evidence. The circuit judge erred, therefore, in refusing to give the general affirmative charge requested by the defendant, and also in refusing to give the second special instruction asked.

The first special charge requested by the defendant was properly refused, because it was based on an assumption as to the directions given by Prather to plaintiff's intestate, which was not supported by the evidence. There was no evidence that Prather directed Bradford to leave the cut when a train came in on the spur track.

That part of the general charge of the court to which exception was reserved should not have been given, because there was no evidence to support some of its hypotheses; but the action of the court in this particular would not operate a reversal of the case.

For the errors pointed out above, the judgment will be reversed, and the cause remanded.

Injuries to Servants—Contributory Negligence—Violation of Company's Rule.—In an action by a widow to recover damages for the death of her husband, who was an engineer in the employ of the defendant, it appeared that the deceased pulled a train of freight-cars in upon a switch track to clear the main track for a passenger train. When the deceased stopped his train he supposed it was in on the side track; but he could not see without standing on the main track. In answer to a signal from the rear brakeman, he stepped on to the main track and then directed the fireman to move the train further. While standing on the main track and looking to the rear of his train, a hand-car with five or six section-men on it, came from the opposite direction, ran over him, and inflicted fatal injuries. Defendant put in evidence a rule which prohibited engineers from permitting firemen to operate the engines except when they themselves were present upon them, and which declared that the engineer and fireman must remain upon the engine while it is at work. There was, however, evidence to the effect that, for years prior to the accident, it had been the constant custom of engineers on the defendant's road to allow their firemen to make short moves like the one in question, the engineer being near at hand, but not on the train at the time. *Held*, that under the circumstances the deceased was not guilty of contributory negligence in stepping off the engine upon the main track to get the signals from the brakeman, and that, in view of the custom proved by the evidence, plaintiff's right to recover was not defeated by the fact that at the time of the accident he was violating the rule. *Barry v. Hannibal & St. J. R. Co., Mo. Sup. Ct., March 23, 1889.*

Same—Contributory Negligence—Disobedience to Conductor's Orders—Custom.—In an action for the death of one of the crew of a construction train, an instruction that if the deceased was killed while in disobedience of a rule of the company or an order of its conductor given him while he was under the command of the conductor, his widow cannot recover for his death, unless it clearly appeared from the evidence that such disobedience did not directly or indirectly contribute in any degree to the injury; that if the deceased, who was killed while sitting on the edge of a car, would have been killed, whether standing or sitting with his legs hanging over the car or not, his disobedience to the order of his superior would not bar the plaintiff's recovery; and that if the conductor had given orders against sitting on the edge of the car, yet if employees were in the habit of riding in that way with the knowledge of the conductor, then a failure to comply with the order would not bar the plaintiff's recovery, correctly instructs the jury as to the law applicable to the case. If it is shown that an employee disobeyed the orders of his superior, the burden is upon the plaintiff to show that such disobedience did not contribute in any degree to the injury. *Prather v. Richmond & D. R. Co., Ga. Sup. Ct., July 11, 1888.*

Same—Contributory Negligence—Sufficiency of Averment that Deceased was without Fault.—A general averment in the complaint in an action for damages for negligently causing the death of an employee that the deceased was without fault, sufficiently alleges that he was not guilty of contributory negligence. *Louisville, N. A. & C. R. Co. v. Sandford, 117 Ind. 265.*

Same—Contributory Negligence—Waiver of Defence.—Although by the North Carolina Statute (Acts 1887, c. 33) the defendant must plead contributory negligence in his answer if he relies upon it as a defence, he may waive the submission of the question and consent that the case

be submitted upon other issues, although he has pleaded the plaintiff's contributory negligence. *De Berry v. Carolina Cent. R. Co.*, 100 N. Car. 310.

Same—Necessity of Averring Servant's Ignorance of Defect.—If the complaint in an action to recover damages for the death of plaintiff's intestate, a baggage master in the defendant's employ, fails to aver that the deceased had no knowledge of the unsafe condition of the bridge which caused the accident resulting in his death, it is fatally defective. *Louisville, N. A. & C. R. Co. v. Sandford*, 117 Ind. 265. The court said: "But there is no averment that the intestate was ignorant of the unsafe condition of the bridge, and the omission of this averment presents the only difficult question arising on the demurrer to the complaint. The general rule is that an employer must use reasonable care, skill, and diligence to provide his employees with a safe working place, and that he must also make reasonably safe the machinery and appliances which the nature of the service requires his employees to use. *Car Co. v. Parker*, 100 Ind. 181; *Baltimore, O. & C. R. Co. v. Rowan*, 104 Ind. 88; *Krueger v. Louisville, N. A. & C. R. Co.*, 111 Ind. 52; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Louisville, N. A. & C. R. Co. v. Wright*, 115 Ind. 378, 33 Am. & Eng. R. Cas. 370; *Louisville, N. A. & C. R. Co. v. Buck*, 116 Ind. 566. This rule requires a railroad company to construct and maintain the bridges which carry its rails across brooks and rivers in a reasonably safe condition. The employees enter its service under an implied contract that this duty will be performed, and under this contract they impliedly assume all the ordinary perils of the service. Employees assume all the ordinary risks incident to the employment, but they assume no extraordinary risks caused by the employer's breach of duty, unless they have knowledge of the unusual danger caused by the breach, and voluntarily continue in the company's employment. If with this knowledge they do continue, then the increased danger becomes an incident of the service which they assume, and for liability from which the master is exonerated. *Indianapolis & St. L. R. Co. v. Watson*, 114 Ind. 20, 33 Am. & Eng. R. Cas. 334.

"The knowledge of the danger adds it as one of the incidents of the employment which the employee assumes. It becomes a danger which his continuance in the master's service makes an incident of the service, and when it takes this character the master is no longer bound to answer for the employee's safety, so far as it is imperilled by the danger voluntarily and knowingly assumed. The knowledge, in conjunction with the continuance in the service, operates as a waiver of the right to make the master responsible. 'It is,' says Mr. Beach, 'the rule applicable to this matter that if the servant, when the defect or danger is brought to his knowledge,—when he discovers that the machinery, buildings, premises, tools, or any other instrumentalities of his labor, are unsafe or unfit, or that a fellow-servant is careless or incompetent,—continues in the employment without protest or complaint, he is deemed to assume the risks of such danger, and to waive any claim upon his master for damages in case of injury.' Beach, *Contrib. Neg.* § 140. This puts the rule exonerating the master on the true ground. He is exonerated because the employee himself assumes the danger as increased, and as he voluntarily assumes it the master is relieved. The parties change positions. The employee assumes the risk that, if it were not for his knowledge, his employer would be compelled to assume. The duty which the employer is under is materially affected by the element of knowledge, and, unless a duty is shown, of course there can be no actionable negligence, since a duty lies at the foundation of every right of action grounded on the negligence of a defendant. It must follow, in order to show a breach of

duty creating a cause of action for its breach, that it is necessary to aver that the employee was ignorant of the default of the employer which increased the perils of the service. The plaintiff in such a case is the actor and must show a complete cause of action, and to do this he must aver facts showing that the danger which augmented the risks of his service was not known to him. In at least two cases this court has explicitly assumed this doctrine. *Lake Shore & M. S. R. Co. v. Stupak*, 108 Ind. 1, 28 Am. & Eng. R. Cas. 323; *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75. From these decisions we should not depart, unless thoroughly satisfied that they are unsound in principle, and of this we are far from being convinced. There is some conflict in the authorities as to the principle upon which rests the rule exonerating the employer from liability in cases where the employee continues in the employer's service after knowledge that his peril has been increased, but the weight of authority, as we believe, supports our decisions. All the authorities agree that negligence on the part of the employer is not to be presumed, and that it rests on the plaintiff to aver and prove every fact essential to the existence of actionable negligence. *Riest v. City of Goshen*, 42 Ind. 339; *Pennsylvania Co. v. Whitcomb*, *supra*; *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484; *Railroad Co. v. Thomas*, 42 Ala. 673; *State v. Philadelphia, W. & B. R. Co.*, 60 Md. 555, 15 Am. & Eng. R. Cas. 481; *Davis v. Detroit & M. R. Co.*, 20 Mich. 105; *The Gladiolus*, 21 Fed. Rep. 417; *Cummings v. National Furnace Co.*, 60 Wis. 603; *Belair v. Chicago & N. W. R. Co.*, 43 Iowa, 662. In stating what the employee must prove, a recent writer asserts that he must establish that he did not know, and had not equal means with the master of knowing, that the machine or appliance was defective. Black, *Proof & Pl.* § 21. Many of the authorities we have cited, and those which follow, assert the same general rule. *Reardon v. Card Co.*, 19 Jones & S. 134; *Duffy v. Upton*, 113 Mass. 544; *Leary v. Boston & A. R. Co.*, 139 Mass. 580, 23 Am. & Eng. R. Cas. 383; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562; *Stoeckman v. Terre Haute & I. R. Co.*, 15 Mo. App. 503; *Railroad Co. v. Duffield*, 12 Lea, 63; *East Tennessee, etc., R. Co. v. Stewart*, 13 Lea, 433, 21 Am. & Eng. R. Cas. 614; *St. Louis, I. M. & S. R. Co. v. Harper*, 44 Ark. 524; *Colorado Cent. R. Co. v. Ogden*, 3 Colo. 499.

"Men may accept employment in a service of a perilous character, and yet not be guilty of contributory negligence, although they do assume all the risks incident to the service which they enter. Men may, without being guilty of contributory negligence, engage in the business of manufacturing gunpowder or dynamite, and yet, when they do engage in such a business, they take upon themselves all the ordinary risks incident to it. Employees engaged in any business, however dangerous its character, have a right to assume that their employer will not subject them to any unknown or extraordinary danger. The employer, however, is bound to do no more than use ordinary care, skill, and diligence to provide for their safety; but this requires that he shall do all that the nature of the employment will permit to accomplish this object. But if he fails to do his full duty, and the employee has reasonable and adequate knowledge of the failure, and continues in the service, he assumes the risk resulting from this failure. There is a class of cases where a man has no right to assume the risk. Society has an interest in the lives of its members, and no citizen has a right to knowingly and voluntarily place himself in a position of immediate and certain danger. *Indianapolis & St. L. R. Co. v. Watson*, *supra*; *Cunningham v. Chicago, M. & St. P. R. Co.*, 17 Fed. Rep. 882, 12 Am. & Eng. R. Cas. 217. Where the danger is not immediate and certain, a man may assume the risk without violating the rule last stated, but in doing so he divests himself of a right to recover

from his employer in cases where the danger is fully and seasonably brought to his knowledge, since the known danger becomes in such cases one of the risks he assumes as an incident of his service. He may not be guilty of contributory negligence in taking some risk, since he may be doing what other reasonably prudent men likewise do; but, like all the others in the common service in which he engages, he assumes all the risks arising from dangers of which he has full notice by continuing in service after he obtains that knowledge; The question comes to us as one of pleading, and not as one of evidence. Material facts must be directly stated in a pleading, but they may be inferred from testimony and from circumstances, when the question is as to the measure and sufficiency of proof. Inferences are admissible and controlling where the question is one of proof, but not so where the question is one of pleading. It is not enough to plead evidence from which facts may be inferred, but the facts themselves must be stated in an issuable form."

Same—Instructions as to Servant's Knowledge of Defect.—Plaintiff, a brakeman on a freight train, was injured by a platform on which he stood to work the brake, giving way. There was evidence to the effect that the platform was defectively constructed, and that there was an old split in it before the accident, but there was no evidence that the plaintiff knew its unsafe condition. *Held*, that the court properly refused to instruct the jury that if plaintiff knew of the unsafe condition of the platform before he stepped on it, he was guilty of contributory negligence, there being no phase of the evidence to warrant such an instruction; and that an instruction given in lieu thereof that if, when plaintiff stepped on the platform, he knew, or by reasonable care could have known, its condition, and that if a prudent man knowing its condition would not have stepped on it, plaintiff was guilty of contributory negligence, was as favorable to the defendant as the evidence warranted. *De Berry v. Carolina Cent. R. Co.*, 100 N. Car. 310.

Same—Negligence—Train Derailed by Cow on Track without Fault of Train-hands.—In an action to recover damages for negligently causing the death of plaintiff's intestate, who was one of the crew on a construction train, it appeared that the engine and train were in a deep cut; that there were two cows near the track; that, when the first cow was seen, the brakes were applied and the speed of the train decreased to about six miles an hour; that after the first cow had crossed the track the second cow suddenly jumped on it; that it was impossible to stop the train after the second cow was seen or could have been seen; and that the foremost car struck it and was derailed, resulting in the death of plaintiff's husband. *Held*, that the evidence was insufficient to show fault or negligence on the part of the company, and that plaintiff could not recover. *Prather v. Richmond & D. R. Co.*, Ga. Sup. Ct., July 11, 1888.

EAST LINE AND RED RIVER R. CO.

v.

CULBERSON.

(Texas Supreme Court, February 5, 1889.)

Unauthorized Lease—Liability of Lessor to Lessee's Servant—Negligence of Lessee.—Where the deceased was employed as conductor of a train by a company operating a road under a lease, and the injury causing his death resulted from the incompetency of the engineer or the imperfection of the lessee's engine, the lessee, and not the lessor, is liable, although the lease was made without statutory authority.

Injuries to Servant—Statute of Limitations—Amendment of Complaint—New Party Plaintiff.—The amendment of a complaint so as to make a new party plaintiff to the action, does not, as to the original plaintiffs, set up a new cause of action, and as to them defendant cannot avail himself of the plea of the statute of limitations; but if the action was not originally brought by or for the benefit of the new party plaintiff, and he was not made a party until after the statutory limitation had run against him, the statute may be pleaded in bar of any recovery by him.

APPEAL from District Court, Camp County.

Todd & Hudgins for appellant.

Moore & Hart, Sheppard & Thompson, J. M. Pouns, and C. A. Culberson for appellee.

GAINES, J.—W. A. Culberson, while operating a train upon the road of the appellant company as conductor, lost his life in endeavoring to make a coupling between the engine under his control and a train in its front. The appellee, who was his wife, brought this suit, on behalf of herself and other beneficiaries, to recover damages under the statute for the injury. She alleged that the accident resulted from a defect in the engine and the incompetency and carelessness of the engineer. During the progress of the trial the defendant offered to prove by a witness that at the time of the accident the road was not operated or controlled by the defendant company, and that the deceased was not in its service at the time, but was in the employment, and was acting for the Missouri, Kansas & Texas R. Co., another corporation. Upon objection to this testimony by the plaintiff, it was excluded by the court. There is a plea in abatement in the record, which sets up that the road of the defendant company was leased to the Missouri, Kansas & Texas R. Co. by authority of law; but it was neither sworn to nor insisted upon at the trial, and it must be considered as waived.

88 A. & E. R. Cas.—15

If, however, the facts justified the conclusion, it was competent, however, for defendant to show under its general denial that although the injury was received upon its road, and was actionable, another company was responsible for such injury, and that it was not liable. Did the evidence offered tend to show this? The defendant did not offer, in connection with its other testimony, to prove that the Missouri, Kansas & Texas Co. was operating and controlling its road by authority of any statute, and we think the question must be treated as if no such authority existed.

We have then the question of the right of a servant of a railway company, operating without authority of statute a road belonging to another corporation, to recover of the owner damages for personal injuries resulting to him in the course of his employment through the negligence of his employer, or of its officers or agents. This is a new question in this court, and one upon which we have found no direct authority which is at all satisfactory. This court has held that a railroad company cannot without statutory authority lease its road to another so as to absolve itself of its duties to the public, and that when such lease is made the lessor is liable for an injury to a passenger resulting from the negligence of the lessee. *International & G. N. R. Co. v. Underwood*, 67 Tex. 589, 34 Am. & Eng. R. Cas. 570; *East Line & R. R. Co. v. Rushing*, 69 Tex. 308, 34 Am. & Eng. R. Cas. 367. We have also held that, in case of an unlawful lease or sale, the lessor or vendor is liable to a shipper for the failure of the company operating the road to furnish transportation upon his demand. *Central & M. R. Co. v. Morris*, 68 Tex. 49, 28 Am. & Eng. R. Cas. 50.

There have been numerous decisions in other states holding the lessor liable, when the lease is unauthorized, for injuries to live stock, and to persons crossing the track, caused by the negligence of its lessees; so that it may now be considered the accepted and settled doctrine, that in all cases where one railroad company is operating trains upon the road of another without authority of law the owner of the road remains responsible for the discharge of its duties to the public, and becomes liable for injuries resulting from the lessee's failure to perform those duties. The lessor, by accepting its charter, assumes the obligation to carry passengers safely over its line. If it intrusts that duty to another company, and a passenger is injured, it is responsible. It binds itself to carry all freight offered to it, and to deliver it safely. Should its lessee fail to do this, it is liable. It assumes to operate its road safely and carefully, so as not negligently to destroy or damage property, and not to injure persons who have the right to pass on or near the track.

Should its lessee negligently do damage to property, or inflict personal injuries upon wayfarers crossing the road, this is failure of duty on its part, and it is responsible for the wrong. But the duties which are owed by a railroad company to its servant are not duties owed to him in common with the public, but grow out of the contract of service. He assumes the relation of servant to his employer voluntarily, and out of it arises the reciprocal obligations from one to the other. It seems to us that the relation of the servant of the company operating the road to the owner is very different from his relation to his employer, and that relation of the owner of the road to him is different from its relation to the general public. His contract is not with the company owning the road, and it may be asked, Does the latter owe him the duty of a master to his servant, or guaranty that the master with whom he has voluntarily contracted will perform its obligation to him? It may be that if the injury had occurred by reason of a defect in the road-bed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by another company operating the owner's road, and was inflicted upon one of its own employees, it is difficult, by reason of a defect in machinery entirely under its control, to see upon what principle of policy or justice the lessor should be held liable merely because it owned the road.

In the case proposed to be made by the evidence offered, it seems to us that the liability of the deceased's employer would have been precisely the same on the defendant's road as if the train had been running upon its own road at the time of the accident. The act of the Missouri, Kansas & Texas Co. in operating the road without a license from the legislature, if such was the fact, was merely illegal in the sense that it was unauthorized, and the object in holding the lessor responsible in such a case is certainly not to impose a mulct or fine by way of punishment. The reason for the rule is the protection of the public who need the protection. The passenger and the shipper of goods have no option, but must avail themselves of the services of the lessees, whether the lease is authorized or not. The law will not permit the owner of the road to shirk its duty to them by turning over its road to another company; nor will it permit it to deny its liability where it has allowed such other company, without authority of law, negligently to injure wayfarers over the track or property along the line. There is no privity between the persons injured in such case and the operating company. It is not so with an employee who voluntarily enters the service of the latter company with a knowledge

Liability to servant when lease unauthorized same as if lessee owned road.

of the facts, and participates knowingly in the wrong, if wrong it be. Where in similar cases a recovery has been permitted against a lessor, it has usually been allowed upon various considerations of public policy: First, because the franchises granted are in the nature of a personal trust, and sound policy demands, so far as the general public is concerned, that the corporation receiving the grant should be held responsible for the proper execution of the powers granted; and, second, for the reason that to deny the responsibility of the lessor would enable a railroad to shirk its responsibility, and to injure the public by placing its property under the control of irresponsible parties; and, third, because a person who has received an injury at the hands of the operating company, and was ignorant of the relations between that company and the owner of the road, might be at a loss to determine against which to bring his action, and thereby placed at a disadvantage in seeking a redress of his wrongs.

None of these reasons apply on the case of the servant of a lessee who is injured through the neglect of his employer. He needs no protection as one of the general public, because he can enter the service or not, as he chooses. He is under no compulsion to take employment from an irresponsible company, and he certainly knows whom to sue for a wrong inflicted through his employer's neglect, for the latter is certainly liable to him in such a case. The reason of the rule which holds the lessor liable fails in case of an employee of the lessee, and we think that to follow it in a case like this would be to give it an arbitrary, and not a reasonable, application. We conclude that the court erred in excluding the testimony, and for this error the judgment must be reversed. We do not know what the evidence may disclose upon another trial as to the relations of defendant corporation and the Missouri, Kansas & Texas Co., and it would be futile to attempt to anticipate the questions that may arise. We merely hold now that the evidence offered and excluded tended, *prima facie*, to show that the defendant was not liable for the alleged injury.

This case was reversed upon a former appeal, because it was then held that the mother of the deceased should have been made a party as an active plaintiff, or as a beneficiary of the recovery. Since the remand of the cause the petition has been so amended as to bring the suit as well for her benefit as for that of the plaintiff and the children of the deceased. To the amended petition, which was filed more than 12 months after the death of the deceased, an exception was interposed upon the ground that the cause of action was barred by the statute of limitations. As to the plaintiff and the original beneficiaries, the

Statute of
limitations—
Joinder of new
party plain-
tiff.

exception was not well taken. The making a new party did not set up a new cause of action. The exception should, however, have been sustained as to the mother of the deceased. The action was neither brought by her, nor for her benefit, until 12 months had elapsed from the time her son died. The suit in behalf of the beneficiaries did not affect the running of the statute against her. But defendant, having pleaded the statute against her, can no longer complain that she is not a party to the action.

We think the other questions raised by the appeal, except in so far as the sufficiency of the evidence to sustain a recovery is concerned, is not likely to arise upon another trial. Since the cause will be remanded, the evidence will not be discussed.

For the errors pointed out, the judgment is reversed, and the cause remanded.

OPINION ON MOTION FOR REHEARING.

GAINES, J.—This is a motion for a rehearing, and is accompanied by affidavits which are intended to impeach a bill of exceptions found in the record. This bill shows the ruling of the court, which in the opinion formerly delivered was held to be reversible error. The affidavits tend to show that the bill was improperly allowed and signed by the trial judge. It is not denied that it was allowed, signed, and filed as a part of the record during term-time. We are of opinion that the record cannot be attacked in this way. If by any undue practice the signature of the trial judge should be procured to a bill of exceptions, which he did not understand, and which he did not intend to sign, we think it would be competent for the court in which the trial was had, upon a motion made for that purpose, to strike it from the record. This might be done even after the adjournment for the term, and after an appeal had been perfected to this court. The trial court has the power, in a proper proceeding, and upon proper proof, so to amend its records as to make them speak the truth, even after the jurisdiction has attached in the appellate court. If the amendment be made after the transcript has been filed in the supreme court, the record may be corrected in the latter court by a suggestion of its diminution and a motion for a *certiorari*. It cannot be corrected here in the first instance, and especially after the cause has been submitted. Besides, the affidavit of the trial judge, which accompanies this motion, shows that at the time he signed the bill of exceptions he knew its contents. If we could disregard the bill, the motion for a rehearing should be granted; but we are of opinion that it must be treated as a proper part of the record in the case.

Impeaching
record on ap-
peal by affida-
vit.

The question upon which the judgment in this case was reversed was not very fully discussed in the original briefs of counsel, and we have therefore deemed it proper to give it a careful reconsideration. The argument of appellees in support of the motion contains a very full citation of authorities, which have been carefully examined, but which have not changed our former opinion. We think a review of the cases cited will show that none of them are inconsistent with our views as formerly expressed. *Railroad Co. v. Meador*, 50 Tex. 85, was a case in which the railroad company was held liable to the owner of land for the trespass of its contractors in entering upon his premises and constructing its road without having first condemned the right of way. The principle decided is that the act which the contractors were employed to perform being unlawful, so far as the land-owner, whose land had not been condemned, was concerned, the company could not escape its liability by showing that the persons who committed the trespass were independent contractors to perform the work. The principle does not apply to the question presented in this case. In *Missouri Pac. R. Co. v. Watts*, 63 Tex. 549, it is said that the appellee, being the servant of the Missouri, Kansas & Texas R. Co., which had leased and was operating the road of the International & Great Northern R. Co., the latter company would not be responsible to him for the negligence of the former, provided the lease was authorized by law. It is not decided that the lessor would have been responsible if the lease had not been authorized. In *West v. St. Louis, V. & T. H. R. Co.*, 63 Ill. 545, it was held that the company was not liable to the servants of its contractors for an injury received through the contractors' negligence. In *Sawyer v. Railroad Co.*, 27 Vt. 370, the defendant company had made a contract with another company by which the latter had the privilege of running its trains over the former's road. It was the duty of the defendant to keep a certain switch on its road in order. Through the negligence of its servants the switch was misplaced, and a locomotive of the other company derailed, the derailment resulting in an injury to the plaintiff, who was a servant of the latter company, on duty upon the locomotive at the time of the accident. There the injury was the direct result of the negligence of the servant of the owner of the road, and the plaintiff was held entitled to recover. If, as seems to be contended in the present case, he was to be considered the servant, not only of the company who employed him, but also of the owner of the road, then he would have been the fellow-servant of the switchman who caused the injury, and he could not have recovered. The case of *Merrill v. Montpelier & W. R. R. Co.*, 54 Vt. 200, virtually reaffirms *Sawyer v. Railroad Co.*, *supra*.

Liability of
lessor to
lessee's ser-
vant—Autho-
rities examined.

There it seems that the defendant company was running over a portion of the road of another company, and that this arrangement was authorized by law. It is apparent that the decision does not apply to the case now before us.

Another case cited is *Nugent v. Boston, C. & M. R. Co.*, *ante*, p. 52. There it is held that "a railroad corporation, over a section of whose track another company, by virtue of a contract, runs its trains, is liable in tort to the latter's brakeman, who, while in the due performance of his duty on his employer's train, receives a personal injury solely by reason of the negligent construction of the former's station house." There the injury complained of resulted directly from the negligence of the company owning the road. It was decided that they were charged with the duty of keeping their road in safe condition for the operation of trains, and that they were liable to the employee of the operating company for an injury resulting from a failure to perform this duty. In *Washington, A. & G. R. Co. v. Brown*, 17 Wall. 445, the lessor company was held responsible to a passenger on a train of the lessee who was improperly expelled from a car by a servant of the latter. The liability of the owner of the road to passengers on the operating company's trains was recognized in the former opinion. *Freeman v. Minneapolis & St. L. R. Co.*, 7 Am. & Eng. R. Cas. 410, seems to have been an action by a wayfarer for an injury received from the railroad train at a public crossing. *Aycock v. Railroad Co.*, 89 N. C. 321, was an action by the owner of land for damage caused to his timber by fire communicated by sparks from a passing engine. *Balsley v. St. Louis, A. & T. H. R. Co.*, 25 Am. & Eng. R. Cas. 497, involves the same principle as the case last cited. *Nelson v. Railroad Co.*, 26 Vt. 717, was a suit against a corporation owning a railroad, for a cow run over and killed by a train of its lessee. The liability which was held to exist in each of the five cases last named, is distinctly recognized in the former opinion in the case before us. The case of *Sellars v. Richmond & D. R. Co.*, 25 Am. & Eng. R. Cas. 451, was brought by the administrator of a servant of the defendant company directly against the company which employed him for injuries which resulted in his death. It throws no light upon the present case.

There are a few other cases cited in the arguments of counsel, but they are upon the same lines, and involve the same principles, as the cases just discussed. None of them are decisions upon the immediate question before us. These cases commented upon afford ample authority for holding that a railroad company, which without authority of law leases its road to another corporation, is responsible for the torts of the lessee, so far as the general public is concerned. Not one of them sus-

tains the position of appellee that the lessor is liable to the servant of the lessee for injuries resulting from the negligence of the latter company. We have found only one case in which a servant of the company operating a railroad under a license of the owner was permitted to recover of the latter for the negligence of the former's servants. This is the case of *Railroad Co. v. Mayes*, 49 Ga. 355. The case, however, presented peculiar complications, and there is another ground upon which the decision might properly have been rested. The immediate question before us was not discussed in the opinion.

We are satisfied that no well-considered case can be found which sustains the doctrine contended for by appellee. A few may be found where the servant of the lessee has been permitted to recover of the lessor for injuries resulting from a faulty construction of its track or from negligence in failing to keep it in repair. But in such a case the injury results from the failure of the lessor to perform its immediate duty. The argument in support of the motion for a rehearing assumes that we have in our opinion treated the plaintiff's suit as an action *ex contractu*. This is a mistake. The suit is for a tort. But the duty, the violation of which gives the ground of action, grows out of a contract. The petition alleges that the defendant was negligent in not furnishing a safe engine and a competent engineer, and that from this negligence the deceased received the injuries which resulted in his death. The duty of furnishing the deceased a safe engine grew out of the relation of master and servant, and this relation was created by his contract of employment. We think it follows that if the deceased was employed as conductor of a train by a company operating the road under a lease, and the injury resulted from the incompetency of the engineer, or the imperfection of the engine furnished him by the lessee, the latter would be liable, and not the lessor.

It does not do to say that the lessee would be the agent of the lessor as applied to this case; this would be a mere fiction, not based upon any sound rule of law. The lessee, under an unauthorized lease, may be deemed the agent of the lessor, so far as the latter's duties to the public are concerned. Having undertaken by its charter to operate its road, the company which it puts in charge of its line may be looked upon as its agent, so far as its general duties under its franchises are concerned. But the duty which is owed to an employee of the lessee is a special one, and not a duty owed to him in common with the general public.

It is also urged that we are in error in holding that the mother of the deceased was barred of her right of action by the statute of limitations. She was a necessary party to the suit, either as plaintiff or beneficiary in the first instance. She was not made

a party until more than one year had elapsed since the death of her son. The amendment which alleged her existence, and prayed a recovery for her benefit as well as that of the other plaintiffs, presented for the first time her right, and it was a new cause of action so far as she is concerned. We see no reason why the rule that applies to tenants in common in suits for the recovery of land, that one may be barred though the others are not, should not apply in this case.

Statute of
limitations.

The motion for a rehearing is overruled.

Injuries to Servant—Common Terminal Facilities—Liability of Companies.—Two or more chartered railroad companies whose lines terminate at the same point, that is, at the same town or city, are not bound as a matter of law to have and use separate terminal facilities, but may within the corporate limits use the same track in common with or without common ownership, and when they do so, a track thus laid, though the exclusive property of one of the companies, is, for the time being, the track of each company so using it, and the proprietary company is not responsible to its employees for personal injuries which they sustain solely by reason of the negligent use of the track by the employees of another company. The redress for such injuries is against the company whose employees are at fault. *Georgia R. & B. Co. v. Friddell*, 79 Ga. 489. The court distinguished this case from *Railroad Co. v. Mayes*, 49 Ga. 355, on the ground that in that case the negligence of the company was in using the franchise as well as the track of the proprietary company; from *Railroad Co. v. Perry*, 58 Ga. 461, and *Perry v. Railroad Co.*, 66 Ga. 746, on the ground that the injury was to a passenger; and from *Coggin v. Railroad Co.*, 62 Ga. 685, on the ground that an employee of the proprietary company was guilty of negligence and the injury was to an employee of a telegraph company.

Same—Engineer Working Temporarily on Line of Connecting Company—Liability of Employer.—A railroad company sending its locomotive engineer (employed by the month) with one of its engines to haul temporarily for another company the trains of the latter over the line of such latter company is not responsible to the engineer for the bad condition of the track, nor for the want of adaptation of the engine to the track, it not being alleged that the employer company knew of such bad condition or want of adaptation, and concealed its information. *Dunlap v. Richmond & D. R. Co. (Ga.)*, 7 S. E. Rep. 283.

Same—Presumptions as to Lease of Road.—When a railroad company chartered by a public law of Georgia is in fact in open possession and use of its own line, there is no presumption that another company, who sends an engineer with an engine to haul the trains temporarily, has leased the road from the proprietary company, or is otherwise using its franchises, although another company may own a majority of the stock, vote the same at stockholders' meetings, thus electing such directors and officers as it sees fit, and has and uses a connecting line, and pays habitually from its regular pay-car the operatives of its ally or dependent. It is the duty of an engineer running trains upon a chartered railroad to know who is in possession of the line and its franchises, or to use due diligence to ascertain, a public law of this state putting him upon notice of the ownership. *Dunlap v. Richmond & D. R. Co. (Ga.)*, 7 S. E. Rep. 283.

MILLER

v.

MINNESOTA AND NORTHWESTERN R. CO. *et al.**(Iowa Supreme Court, September 28, 1888.)***Construction Train—Control of Contractor—Liability of Company.—**

When, by a contract for the construction of its road, a railroad company agrees to furnish the motive power and operate the construction trains, and the contractor agrees to handle all material and build a certain number of miles per month, the construction trains are placed under the control of the contractor, and the company is not liable for the negligence of an engineer in its employ in running a construction train at a dangerous rate of speed.

APPEAL from District Court, Dubuque County.

Action by Elizabeth Miller, administratrix of Joseph Miller, against Minnesota & Northwestern R. Co., Dubuque & Northwestern R. Co., and Minnesota Loan & Debenture Co., to recover damages for injuries to plaintiff's intestate, which resulted in his death. The injury was caused by a construction train upon which the deceased was riding, and which, it is alleged, was so negligently operated that it spread the rails, left the track, and partially turned over, and in consequence thereof Miller was killed. There was a trial by jury, and a verdict and judgment for plaintiff against Minnesota & Northwestern R. Co., from which it appeals, and judgment for defendants, Dubuque & Northwestern R. Co. and Minnesota Loan & Debenture Co., on motion, from which plaintiff appeals.

Fouke & Lyon and *Lusk & Bunn* for appellant, Minnesota & Northwestern R. Co.,

Henderson, Hurd, Daniels & Kiesel for appellee, Miller.

ROTHROCK, J.—The train by which the deceased was killed was a tracklayers' construction train. The road was unfinished at the place of the accident. The rails were not spiked to all

Facts. of the ties; and as the train, which consisted of cars heavily loaded with steel rails and other construction materials, was being backed to the end of the track, the rails in the track spread, the train was derailed, and Miller, who was riding on one of the cars loaded with rails, was killed. A material question in the case is, Was the defendant in any event liable in damages for the alleged negligence claimed to be the cause of the casualty? The question arises upon a contract

between the defendant company and a partnership known as Harris & Co., which contract is as follows:

"ST. PAUL, MINN., July 9, 1886.

"A. B. Stickney, Esq., President Minnesota & Northwestern Railroad Company, St. Paul, Minnesota—DEAR SIR: The undersigned hereby propose to lay as much track as you may require on the Dubuque & Northwestern Railway, from the end of the present track near Durango, westward, commencing about the 20th of August next, and laying at the rate of not less than thirty-five (35) miles per month. Also to lay what track you may require on the line of the Minnesota & Northwestern Railroad, between Chicago and the junction with the Illinois Central Railroad near Freeport, commencing immediately after completing the work on the Dubuque & Northwestern Railway, above specified, at the rate of not less than thirty-five (35) miles per month, to lay such track in good workmanlike manner at sub-grade, and to handle all material, including loading and unloading rails and ties that are delivered during the time we are laying track, at and for the sum of two hundred and twenty-five (\$225) dollars per mile, with an extra allowance of twenty (\$20) dollars for each split switch and frog, and fifteen (\$15) dollars for each stub switch and frog. You to furnish all motive power and cars and operate the construction trains; we to furnish all tools and machinery and labor necessary to lay said track. This price to cover all royalty for the use of machines. Payment is to be made on the 15th day of each calendar month for all work done during the previous month, reserving ten per cent (10 per cent) until all of said work is completed.

"HARRIS & CO.,

"By GEO. F. HARRIS."

"This proposition is accepted. M. & N. W. R. R. Co.,

"By A. B. STICKNEY, President."

Under this contract the appellant furnished a construction train with a crew to operate it, and Harris & Co. proceeded with the work of tracklaying. The plaintiff's intestate was an employee of Harris & Co., engaged in laying down the rails on the track. At the time of the accident by which Miller was killed, he was riding to the front, to his work, and was seated on a platform-car loaded with rails. Harris & Co. were made defendants in the action, but they obtained an order for a separate trial in the district court.

It is not claimed by counsel for the plaintiff that the appellant is liable by reason of any negligence in attempting to run the train over an insufficient and unsafe track. It is conceded that the manner in which the track was laid was a matter not under the control of the appellant, and that it is not liable for any negligent acts of Harris & Co. But it is claimed that, under the

above contract and the evidence in the case, the defendant is liable for the negligent conduct of its engineer in running the train over an unfinished track at a dangerous rate of speed, without keeping a lookout ahead. This question is to be determined mainly by a construction of the said written contract. It will be observed that the construction train was under the absolute control of Harris & Co. There is no dispute as to the correctness of this proposition, so far as the general direction of the work to be done by the train was concerned. This is necessarily implied from the fact that the contract requires Harris & Co. to handle all material, and to load and unload the same as required for the work. They were bound by the contract to lay the track at the rate of 35 miles per month, and to do their work they must of necessity have had the control of the train. They could direct it to be placed at any desired point on the road to load or unload, direct it when to start on a trip, and when and where to stop, and the number of trips. All of this seems to be conceded by counsel for appellee; but they claim that the trainmen were not under the control of Harris & Co. as to the speed with which the train was to be run over the road, and as to the care with which the same was to be managed while in motion. There is no evidence that the defendant, by any direct act, retained any control over the train and its crew. On the contrary, as it was at work in constructing a road, it was not running under any time card, nor by the direction of any train-dispatcher of the defendant. The fact the engineer, fireman, brakeman, and conductor who composed the train crew were retained upon the defendant's pay-rolls, and received their wages from the defendant, does not tend to show that the defendant retained any control of the movements of the train. The furnishing of the train and the payment of the trainmen was part of the consideration paid by the defendant to Harris & Co. for laying the track.

Counsel for appellee claim that, under the clause of the contract requiring the defendant to "operate the construction train," the control of the train crew as to the rate of speed at which the train should be run, and the care and vigilance to be exercised by the engineer, was not given to the contractors. This we think was giving the word "operate," as used in the contract, a much more extended significance than is authorized by the contract. It is not used in the general sense common to all the acts necessary to the use of a railroad by moving trains over it. The whole scope of the contract shows that it is used in the restricted sense that the necessary force was to be furnished to move the train over the road at such times as directed by the contractors, Harris & Co.; and to limit the control of Harris &

Control of
train was
given to con-
tractors by
contract.

Co. so as to allow the trainmen or the defendant to determine how fast or how slow the train must be run, finds no warrant in the contract. Suppose that the trainmen should have persisted in running the train so slow as to seriously impede the progress of the work, or that they should run so fast as to endanger the safe carriage of the materials, there can be no doubt that Harris & Co. had the power to require them to move the train at a proper rate of speed. As we construe this contract, the defendant is not liable for the damages occasioned by the death of plaintiff's intestate, and the court should have so instructed the jury. The rule is well established,—indeed, it is fundamental,—that where an independent contractor is employed to construct a building, or to perform any other work, and the employer reserves no control as to the manner of performance, the employer is not liable for the contractor's negligence. *Kellogg v. Payne*, 21 Iowa, 575; *Callahan v. Burlington & M. R. Co.*, 23 Iowa, 562; *Wood v. Independent School-district*, 44 Iowa, 27. And to the same effect, and as somewhat bearing upon the facts in this case, see *Wood v. Cobb*, 13 Allen, 58; *Kimball v. Cushman*, 103 Mass. 194; and *Hitte v. Republican Valley R. Co.*, 19 Neb. 620.

The Dubuque & Northwestern R. Co. and the Minnesota Loan & Debenture Co. were made parties defendant. The court, on their motion, directed a verdict for them. The plaintiff appeals from this order of the court. The cause must be affirmed upon this appeal. It does not appear that either of said defendants had any control over the train nor the laying of the track. The judgment of the district court upon plaintiff's appeal will be affirmed, and upon defendants' appeal it will be reversed.

Liability of Railroad Companies for Acts and Defaults of Contractors.—See *Hughes v. Cincinnati & S. R. Co.* (Ohio), 15 Am. & Eng. R. Cas 100, note 110; *Burton v. Galveston, H. & S. A. R. Co.* (Tex.), 21 Ib. 218..

ST. JOHNSBURY AND LAKE CHAMPLAIN R. CO.

v.

HUNT.

(*Vermont Supreme Court, September 25, 1888.*)

Arrest of Engineer on Civil Process—Power of Officer to Stop Train.—An officer having a writ to arrest the body of an engineer upon civil process against him, may stop the train upon which the engineer is employed if necessary to effect the arrest.

ON exceptions from Caledonia County Court.

Action on the case for stopping the plaintiff's cars. The court having sustained a demurrer to defendant's special pleas, the defendant excepted. The case has already been twice before the supreme court upon other points. See 15 Am. & Eng. R. Cas. 113; 29 Ib. 234.

P. K. Gleed for defendant.

Ide & Stafford for plaintiff.

POWERS, J.—This case was heard upon a general demurrer to the defendant's third special plea. The declaration in substance charged that, while the plaintiff was lawfully and properly operating its railroad in running a train of which Collins was the engineer, its engine struck and injured a heifer of the defendant, there by the fault of the defendant, wrongfully upon its track; and the defendant, knowing he had no legal cause of action against the plaintiff, for the purpose of injuring the plaintiff and delaying and hindering the operation of the railroad, sued out a writ, and caused an officer thereunder to arrest the body of Collins, the engineer, by stopping the train for that purpose.

The third plea alleges that the defendant had a legal cause of action against Collins, which was equally enforceable against the plaintiff, founded upon the negligence of Collins, the plaintiff's servant, in causing the injury to said heifer; that suit thereon was brought against Collins tortwise; that the defence to said suit was assumed by the plaintiff in behalf of Collins, and therein the question whether said heifer was unlawfully and by the defendant's fault upon said railroad track was litigated; and that it was adjudged in said suit that said Collins was in the wrong, and judgment was entered in favor of the now defendant

against Collins; and that the arrest of Collins upon the writ in said cause was in pursuance of the defendant's legal right, and no more was done than was necessary to that end.

The question raised and argued before us was whether an officer, having a legal process in which he is commanded to arrest the body of the defendant, may stop a railroad train for the purpose of making an arrest of the engineer of such train. The defendant, in his brief, says: "The question submitted is this, Had the officer the legal right to stop the train for the purpose of arresting Collins?" The plaintiff, in its brief, says: "This case is not to be decided upon the theory that the plaintiff's only claim to recover rests upon the fact that, as an incident of the arrest, he lost the service of an employee. That is not the claim we press. The question is one of public policy." The court below sustained the demurrer on the ground that the officer had no right to stop the train to arrest the body of the engineer upon civil process against him.

It is conceded by the plaintiff that an officer having proper process might lawfully stop a train to arrest its engineer in a criminal proceeding, but the argument is that in civil proceedings the consequences are—or in conceivable cases might be—so detrimental to the public using the railroad, that the court should hold, on grounds of public policy, that the right does not exist.

Power of officer to stop train to effect arrest.

The process was a legal one, commanding the officer to arrest Collins. The command in the process was the command, not of Hunt, but of the law. The officer did not act in making the arrest because Hunt commanded him, but because the law commanded him. Hunt, to be sure, had invoked the issue of the process, but the sheriff's justification and authority was the command of the process. Cases may easily be conceived in which, upon consideration of relative convenience and inconvenience, the stopping of a train to serve a justice's writ upon its engineer would seem to be ridiculous. But, on principle, would it be any more so, if the train was stopped to serve a writ upon the engineer, claiming \$10 in damages for an assault and battery, than stopping it to arrest him in a criminal proceeding, seeking to impose a fine of \$10 upon him for the same assault? It will hardly do to rest the question upon conjectural difficulties. If it is a question of public policy, it is so because its usual, normal, and legitimate consequences are hurtful to the public. As a practical fact there is little danger that officers will have occasion to stop a train for the service of process of any kind. Again, it is conceded that the officer might arrest the engineer at a station on the road. But this would delay the train just as long, and work precisely the same inconvenience to the public, as stopping it between stations.

It is admitted that an officer might stop a stage-coach to arrest the driver. This, conceivably, might delay the passengers on their way to a railroad station, so that they fail to reach a train that their business requires them to take. What is the difference in principle between an act which hinders the passenger on a public conveyance to the train and an act which hinders him while on the train? If the question is one of public policy, it must apply generally to public carriers. But we think the right to arrest cannot be defeated upon any considerations that public policy forbids its exercise in the case of locomotive engineers. The command of the process is the voice of the law speaking to its officer. It is the order of the state of Vermont to do the act complained of. There is no room for the doctrine of public policy in such a case. It is illogical and absurd to say that the command of the law cannot be executed because, on grounds of public convenience or expediency, the court thinks it better to nullify the law.

The plea alleges that the defendant's cause of action existed against the plaintiff as well as Collins. The suit for the injury to the heifer might have been maintained against the railroad company. Had it been so brought, and had the officer stopped the train to attach railroad property on board, the same mischievous consequences to the public would have resulted as those now portrayed. Can it be claimed that process against a railroad company is not to be served as it may be against other defendants, because it will work inconvenience to the public? Process served upon an individual may work incidental injury to others. If a physician is arrested, his patients may suffer.

It is quite apparent that the argument that public policy forbids the service of process as made in this case is unsound and illogical. The legislature can establish any regulations in the premises that may be needed.

The judgment is reversed, and judgment is rendered that the demurrer be overruled; and the third plea is sufficient. The cause is remanded, with leave to the plaintiff to plead on the usual terms.

MISSOURI PACIFIC R. CO.

v.

RICHMOND.

(Texas Supreme Court, April 26, 1889.)

Libel—Liability of Corporation—Exemplary Damages—Malice.—A corporation is civilly responsible for damages on account of a publication which, if made by an individual, would be libelous, and exemplary damages may be recovered when it is shown that the libel was published with express malice.

Same—List of Discharged Employees—"Carelessness."—Where a railroad company, in a list of discharged employees, states that a conductor was discharged for "carelessness," the language used must be deemed to mean that he was careless in his business and employment as conductor, and was careless and unworthy of employment at the date of publication.

Same—Publication—Evidence of Malice.—Where it appears that the entry in the discharged list of a railway company concerning plaintiff was made upon the report of his superior officer, that the officer who caused the list to be published was a stranger to plaintiff and had no malice towards him, and that the list was published for the personal convenience and private information of the officers of the company only, there is no evidence to justify a finding of malice on the part of the company's officers and to warrant a recovery of exemplary damages.

Same—Publication for Use by Officers of Company—Privileged Communication.—A discharged list prepared in good faith by the officers of a railroad company upon the report of those having the employment and control of its servants, and distributed amongst its officers for the purpose of preventing the employment of careless and incompetent hands, is a privileged communication.

Same—Distribution among Other Companies—Privilege.—A list of discharged employees prepared by a railroad company and distributed among the officers of other corporations having the employment of railroad hands for the purpose of preventing the employment of careless or incompetent servants, is privileged, and, in the absence of evidence showing express malice, a person whose name appears therein has no right of action.

APPEAL from District Court, McLennan County.

Clark, Dyer & Bollinger for appellant.

STAYTON, C.J.—The nature and result of this action is thus correctly stated in brief of counsel for appellant: "Appellee sued appellant for three thousand dollars as actual, and twenty thousand dollars as exemplary, damages, claimed to have resulted to him on account of alleged libelous matter claimed to have been made and published of and concerning appellee by appellant charging substantially as follows: That

Case stated.

appellant composed and published a certain discharge list in February, 1884, which was in the form of a printed pamphlet, and which contained, among many other names, the name of appellee; the particular matter complained of in said pamphlet being, in substance, that 'A. F. Richmond,' a 'conductor' on the 'I. & G. N.,' was 'discharged' in 'July, 1883,' for 'carelessness,'—appellee claiming that said publication was circulated among all railroad men in the country, both in and out of Texas, and that it greatly damaged him in his reputation, and prevented him from ever afterwards getting railroad employment, or employment of any kind, notwithstanding he made repeated applications for employment; that the matter alleged to have been printed and circulated was false and scandalous, and was composed and published maliciously by appellant." Appellant excepted generally and specially to plaintiff's petition, and set forth that the matter was not a libel, for the reason that it was not defamatory of appellee; that the innuendoes set forth by appellee were not justified by the plain import and meaning of the words; and that appellant was a corporation, and not capable of bearing malice, and not liable for exemplary damages, etc. Appellant also pleaded a general denial, and specially one year's statute of limitation, and that said publication was composed and published by appellant in the proper and necessary course and conduct of its business as common carrier of freight and passengers; that, in the management of its numerous lines and different divisions of its railway traversing several different states, it was impossible to properly guard against the re-employment of unworthy men without some such list as the one complained of; that all of the information contained in the list was true, and especially the matter stated of and concerning appellee; that he was discharged for gross carelessness in his business as conductor for defendant in July, 1883, and for a total failure to observe or comply with the well-known rules and proper regulations of appellant; that the matter published was not false in any particular, but true, and that same was without malice, but done in discharge of a duty defendant owed to the public as well as to itself, by reason of the public nature of its business; and that said publication was absolutely privileged matter. Appellee, by trial amendment, pleaded that the printed matter was composed and published by A. A. Talmage, the fourth vice-president and general manager of defendant, to which plea appellant specially excepted, and then pleaded a general denial. The court overruled all of appellant's exceptions, and the cause went to the jury, who, after hearing all the evidence and charge of the court, returned a verdict for appellee for \$250 actual damage, \$1750 exemplary damage, and judgment was rendered in accordance with the verdict.

On December 16, 1885, appellant caused a rule to be entered requiring appellee to give security for costs, and, this not having been done, on the fourth day of the succeeding term a motion to dismiss was filed. On the second day after this, appellee, in accordance with article 1438, Rev. St., filed an affidavit of inability to give security for costs, which had ^{Security for costs.} been made some days before, and it seems placed in the hands of his counsel. Appellee was not present, and his counsel filed a sworn statement to the effect that the rule had been entered at the former term after the cause was disposed of for the time and without notice; that it had been agreed between counsel that the cause would not be called for trial before the fifth week of the term then pending, which the record shows was observed; and that the affidavit filed had been prepared and placed in the hands of counsel, in consequence of a suggestion of the clerk that he would ask security for costs. The court overruled the motion to dismiss, and this ruling is assigned as error. The statute is no more stringent now than heretofore, and from the early days of this court it has been held error to dismiss an action, although a cost-bond may not have been filed within the time prescribed, if tendered before the case was actually dismissed. *Cook v. Beasely*, 1 Tex. 591; *Rhodes v. Phillips*, 2 Tex. 161; *Hays v. Cage*, Id. 504. The affidavit supplied the place of a cost-bond.

An exception to the petition was overruled, which questioned the capacity of a corporation to publish a libel, and denied appellant's responsibility for damages, actual or exemplary, on account of a publication which, if made by an individual, would be libellous. Whatever controversy may at one time ^{Liability of corporation for libel.} have existed, it must now be held that a corporation may become civilly responsible for libel. *Philadel. phia, W. & B. R. Co. v. Quigley*, 21 How. 202; *Machine Co. v. Souder*, 58 Ga. 65; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48; *Maynard v. Fireman's Fund Ins. Co.*, 47 Cal. 207; *Boo-gher v. Life Association*, 75 Mo. 319; *Association v. McDermott*, 44 N. J. Law, 431; *Aldrich v. Press Printing Co.*, 9 Minn. 133; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Hewitt v. Pioneer Press Co.*, 23 Minn. 178; *Vinas v. Merchants' Mut. Ins. Co.*, 27 La. Ann. 367; 2 Mor. Priv. Corp. § 727; *Townsh. Sland. & Lib.* § 265; *Cooley, Torts*, 136. The rule now recognized is that corporations, like individuals, may become liable for damages exemplary in character, and the main controversy has been as to whether they become so liable whenever the wrong committed is such as would authorize the imposition of such damages on the guilty agent, or whether it must be shown that the managing agents of the company directed the wrongful act, or subsequently ratified it. That exemplary damages

may be awarded when it is shown that a libel has been published with express malice, as in other classes of torts done maliciously or wantonly, is well settled. *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Hewitt v. Pioneer Press Co.*, 23 Minn. 180; *Hunt v. Bennett*, 19 N. Y. 173; *Gilreath v. Allen*, 10 Ired. 69; *Cramer v. Noonan*, 4 Wis. 231; *Hosley v. Brooks*, 20 Ill. 116; *Snyder v. Fulton*, 34 Md. 128; *Townsh. Sland. & Lib.* 506, 538.

The petition alleged that, by the language used, appellant meant and intended to charge that appellee was careless in his business and employment as conductor, and that he was so careless and unworthy of employment at the date of publication:

Meaning of
"careless-
ness" when
used in dis-
charge list.

and it is claimed that the language was not susceptible of the meaning attached to it, and that in so far an exception to the petition should have been sustained. It seems to us that such was the natural import of the language alleged to have been used, and that the

ruling of the court in this respect was correct. Appellee alleged that his employment was that of conductor in the railway service, and that in this and all lower grades of that service, by long experience, he had become proficient, capable, and skilful, and that by reason of the publication complained of he had since been unable to obtain employment, whereby he was damaged. It is claimed, in view of these facts, that the publication was not libelous, and that an exception presenting this question should have been sustained.

The occupation alleged was one lawful in character, and we understand that "language which concerns the person in his employment will be actionable, if it affects him therein in a manner that may as a necessary consequence, or does as a natural or

Damages re-
coverable for
statement pre-
venting em-
ployment.

proximate consequence, prevent him deriving therefrom that pecuniary reward which probably he might otherwise have obtained," is actionable. *Townsh. Sland. & Lib.* § 182. If, as alleged in the petition, the pamphlet containing the language complained of was

by appellant placed in the hands of those charged with the duty of employing conductors on the different lines of railway throughout the country, it seems to us that the effect of this would be to prevent his obtaining employment in that business for which he alleges he had fitted himself by many years' service, and if the charge was untrue, and published with actual malice, as alleged, it was libelous. There is a conflict in the evidence as to whether the language of which appellee complains was true. On his part there is much evidence tending to show that he was a careful and skilful conductor; but, on the other hand, there is much evidence showing specific and repeated acts of carelessness and disregard of duty. The evidence, however, does show

that such reports were made by those persons whose immediate duty it was to supervise the appellee to the officer of the company who caused the pamphlet to be printed, as would not only have justified the publication to be made, but as would have required it to be made, or in some manner the same facts to have been made known to all persons whose duty it was to take charge of employments for appellant. It was shown that appellant was operating about 6000 miles of railway, and had in its employment about 24,000 employees, and that without some such source of information it was impossible to prevent the re-employment of an employee on one part of the line when discharged from another, for cause, which made it the duty of appellant to its employees, the public, and itself not again to receive the discharged person into its service. There is no evidence tending to show that the persons who gave information on which the publication was made were not worthy of credit, or that they acted through any other motive than a desire to guard those whose duty it was to employ from employing persons unfit for employment in railway service; nor is there evidence showing that the pamphlet containing the language complained of was ever placed by the officers of appellant company in the hands of any person other than its own employees, to whom it was proper to give information necessary to guide them in the selection of persons to serve the company. This it was the right of the appellant to do, and while it might be liable for actual damages for so doing, if the publication was false, it is certainly true that no inference of the existence of actual malice could be drawn from the facts shown by the record before us. There can be no pretence that the officer of the company who caused the pamphlet to be published was actuated by ill will towards or desire to injure appellee, who was a stranger to him. The evidence of that officer, uncontradicted, was in substance that he had the pamphlet published; that it was not issued with any bad feeling or malice towards plaintiff, or for the purpose of injuring him, or any one else; that the book was gotten up for the personal convenience and private information of the officers of the company only, in order that they might protect the lives and property of the public, and also the interests of the defendant, by securing to the company only good, careful, and reliable men; that he did not know plaintiff; that there were about 24,000 persons in the employ of defendant at the time the pamphlet was printed; that it was necessary to have this discharge list in order to guard against re-employing men who had proved themselves incompetent or untrustworthy; that he printed about 100 copies of the book, and sent them to officers of the company only, and,

Evidence does
not show
malice.

if one ever got outside of keeping of proper officers, it must have been surreptitiously obtained.

We understand the law to be that a communication made in good faith, in reference to a matter in which the person communicating has an interest, or in which the public has an interest, is privileged, if made to another for the purpose of protecting that intent; and that a communication made in the discharge of a duty, and looking to the prevention of wrong towards another or the public, is so privileged when made in good faith. In such cases, although the statements made may have been untrue, malice cannot be implied from the fact of publication, and to sustain an action the existence of evil motive must be proved. In the case of *Harrison v. Bush*, 5 El. & Bl. 348, it was said: "A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contained criminatory matter, which, without this privilege, would be slanderous and actionable. . . . 'Duty,' in the proposed canon, cannot be confined to legal duties which may be enforced by indictment, action, or *mandamus*, but must include moral and social duties, of imperfect obligation." "Where words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith, and in the belief that it comes within the discharge of that duty, or where they are spoken in good faith, to those who have an interest in the communication, and a right to know and act upon the facts stated, no presumption of malice arises from the speaking of the words, and therefore no action can be maintained in such cases without proof of express malice. If the occasion is used merely as a means of enabling the party uttering the slander to indulge his malice, and not in good faith, to perform a duty or make a communication useful and beneficial to others, the occasion will furnish no excuse." *Bradley v. Heath*, 12 Pick. 164; *Noonan v. Orton*, 32 Wis. 112; *Harper v. Harper*, 10 Bush. 456; *Harwood v. Keech*, 4 Hun, 390; *Townsh. Sland. & Lib.* §§ 241-245.

This action is based on the proposition that the publication was made by a representative of the appellant corporation, in the course of his employment or in the discharge of the duties of his office, and that for this reason appellant, corporation though it is, is in law the maker and publisher of the libel. In the discharge of the duties imposed upon that officer, it was his duty to appellant and to the public alike to see that none but competent and careful men were employed to conduct its business, which, when conducted with the utmost care, is always

Discharged-
list for use of
company's
officers is
privileged.

attended with great danger. This duty he could not discharge in person throughout all the lines operated by appellant, and it became necessary that persons on different parts of the line should be clothed with power to employ servants. The officer having been informed, by a creditable person or persons, that appellee was not a careful man; that he had been careless in the discharge of his duties as a conductor to such extent as to made his discharge necessary,—it became his duty to place this information in the possession of all persons having power to employ, and a failure to do so would have been a breach of duty. A publication so made is not actionable, in the absence of proof of actual malice, and, as there was no evidence of this, the court below should not have submitted a charge under which the jury could have found in favor of appellee any exemplary damages.

We are further of the opinion that the court should have granted a new trial, on the ground that there was no evidence sufficient to show express malice; for, in the absence of this, the language complained of, under the circumstances of the publication, was not actionable, and appellee, therefore, not entitled to damages, either actual or exemplary. If, as claimed by appellee, the publication had been placed in the hands of the agents of other railway companies without malice, but for the sole purpose of enabling such agents to avoid the employment of unsuitable persons, whether so communicated by request or not, looking to the public interests involved, we do not see that such a publication would be actionable. It seems to us that any person, who, upon reasonable grounds, believes himself to be possessed of knowledge which, if true, does or may affect the rights and interests of another, has the right in good faith, to communicate such belief to that other, and he may make the communication with or without request, and whether he has or has not personally any interest in the subject-matter of the communication. Mr. Townshend states even a broader rule, which does not require that reasonable or probable cause for the belief should exist. Townsh. Sland. & Lib. § 241. The rule is illustrated by this author in the cases cited by him to sustain the proposition that a former employer may, without rendering himself liable in an action for libel, in good faith state, with or without previous request, what he may believe to be true of one formerly in his employment. Looking to the public interests involved in the safe operations of railways, as well as the interests of their owners, it seems to us that one, having reasonable ground to believe that a person seeking important position in that service was incompetent, careless, or otherwise unfit, would be under such obligation to communicate his knowledge or be-

Discharged-
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lief to all persons likely to employ such unsuitable person in that business as would make the publication privileged, if made in good faith.

Appellee alleged that he sought employment from many railway companies, and that he had been refused employment on account of the publication of which he complains, but he did not allege the names of the persons to whom he had made application, and for the want of such averments on this point his evidence was objected to. We are of opinion that the averments of special damages were sufficient on general demurrer, and that, if appellant desired more specific averments as to the persons who had refused employment to appellee, it should have called for this, by pointing out the specific defect by proper exception. For the errors noticed the judgment of the court below will be reversed, and the cause remanded.

Libel—Publication of "Discharge List."—See *Bacon v. Michigan Cent. R. Co.* (Mich.), 20 Am. & Eng. R. Cas. 633, note, 637; s. c., 31 lb. 357, note, 363.

MEMPHIS AND CHARLESTON R. CO.

v.

GREER.

(*Tennessee Supreme Court, May 28, 1889.*)

Conductor—Permitting Person on Freight Train against Rules—Indemnity to Company.—Where the conductor of a freight train, in violation of the rules of the company, allows a person to travel thereon without a special permit, and such person is injured through the negligence of other servants of the company, the violation of the conductor's duty in so permitting the injured person to travel, is, as in a question between the conductor and the company, the proximate cause of the injury, and the company is entitled to indemnity from the conductor against any liability to the injured person.

Same—Breach of Contract—Joint Tort-Feasors.—The right of the company to indemnity under such circumstances arises from the conductor's breach of his contract of employment and not from a claim to contribution between joint tort-feasors.

Same—Set-off against Judgment in Favor of Conductor—Injunction.—Where a conductor, who has been injured by the negligence of other servants of the company, has recovered a judgment for damages, and an action has been brought by a person whom the conductor allowed to travel on the train against the company's orders, and for whose injuries

the conductor is bound to indemnify the company against liability, a court of equity will, on the ground of equitable set-off, enjoin the collection of the judgment in favor of the conductor until the decision of the suit at the instance of the injured passenger.

Same—Quia Timet Bill—Irreparable Injury.—Under such circumstances, when the conductor is insolvent, the bill will lie as *quia timet* bill to prevent an irreparable injury.

APPEAL from Chancery Court, Shelby County.

Bill by the Memphis & Charleston R. Co. for an injunction restraining the collection of a judgment rendered in favor of T. F. Greer, a conductor in its employ. The complainant appeals from an order sustaining a demurrer, and dismissing the bill.

Poston & Poston for appellant.

Pitts, Hays & Meeks for appellee.

DICKINSON, Special Judge.—The bill charges that defendant, Greer, recovered a judgment in this court for \$8000, for personal injuries against complainant, the Memphis & Charleston R. Co., and that defendant is about to enforce collection of the same; that Greer was, at time of injury for which he recovered said judgment, in the employ of complainant as a freight conductor, in charge of a freight train; that there was, at this time, a rule of said company in force prohibiting any person from riding on its freight trains, unless by special permit from the superintendent or train-dispatcher, and that this rule was known to Greer, and that it was his duty, as conductor, to enforce it; that at the time Greer was injured one Powell, a kinsman of Greer, was riding on the freight train of which Greer was conductor, without the requisite permit, and in violation of said rule, and with Greer's consent, and that Greer knew he was, in permitting this, violating the rule of the company, which it was his duty to enforce; that in an accident which happened to said train Powell was injured, and that he had sued complainant in the courts of Mississippi for said injuries, in the sum of \$5000; and that the suit was pending at the time of filing this bill. The bill further alleges that the defendant is wholly insolvent, and prays that he be enjoined from collecting \$5000 of said judgment until the termination of the Powell case, and that, in the event judgment should be recovered by Powell, it shall be satisfied out of the \$5000 impounded. Complainant tendered with its bill the excess of the judgment, with interest and costs, in favor of Greer, over \$5000, and the chancellor granted a fiat for the injunction, conditioned upon the execution of a bond in the penalty of \$10,000, and the payment into court of said excess,—all of which was done, and the injunction issued. Defendant demurred, and assigned 11 grounds. By consent of parties, the East Tennessee, Virginia & Georgia R. Co. was allowed to file

Case stated.

an amended and supplemental bill, which set up that it was the lessee of complainant's road, and was operating the same, and was the real party in interest in respect of all matters involved in litigation. It also repeated, in substance, the allegations of the original bill. A new injunction bond was given, and it was agreed that the injunction already executed might remain in force. The defendant, Greer, was paid the excess over \$5000, and, upon the execution by him of a refunding bond in the penalty of \$10,000, complainant was ordered by the court to pay him the remaining \$5000, which was done. Defendant relied upon the demurrer filed to the original bill, and assigned three additional grounds. The cause was heard upon demurrer, and the chancellor dismissed the bill, and decreed that the refunding bond be cancelled, and from this decree complainant appealed.

The grounds of demurrer, 14 in number, are too numerous to be set forth in detail, and, besides, the same question is presented, under separate assignments, in but slightly varying aspects. Summarized and grouped, they present the following propositions, in substance: First. Whether the bill can be maintained under the head of equitable set-off, because of the want of any present subsisting demand against the defendant; the demand set up in the bill being a mere possibility, a contingent liability, that may never be fixed. Second. As the bill is predicated upon a liability to Powell for a wrong, this, by implication, is an admission that complainant has been guilty of negligence; and therefore it should not be permitted to maintain its bill to make defendant liable to it for losses which it has sustained by its own wrongful conduct. Third. That complainant cannot make defendant answerable to it for such losses incurred by injuries to Powell, unless it alleges that the injuries occurred through the default of defendant as a proximate cause, and that the same was in no wise occasioned by any negligence of complainant, either as a proximate or concurrent cause. Fourth. That, though it be alleged that defendant violated his duty, yet this was not the cause of the injury, but that some other independent act of complainant was the approximate cause, and that, therefore, complainant, being itself a wrong-doer, cannot call upon defendant for contribution.

The theory of the bill is that one of the duties of defendant's employment was to prevent persons from riding on the train of which he was in charge, and that, in violation of his obligations to the company, defendant permitted Powell to be in the position where he was injured, and thus created relations between Powell and complainant by which complainant might become liable to him. The contention is that, no matter what

**Liability of
agent for loss
caused by
breach of
instructions.**

might have happened to the train, no liability could have arisen to Powell but for wrongful and conscious violation by defendant of a rule which was intended to protect the company from exactly such responsibility, and for the enforcement of which, as one of his express duties, he was employed. Story on Agency, § 217*c*, says: "Wherever an agent violates his duties or obligations to his principal, whether it be by exceeding his authority or by positive misconduct, or by mere negligence or omission in the proper functions of his agency, or in any other manner, and any loss or damage thereby falls on his principal, he is responsible therefor, and bound to make a full indemnity. In such cases it is wholly immaterial whether the loss or damage be direct to the property of the principal, or whether it arise from the compensation or reparation which he has been obliged to make to third persons in discharge of his liability to them for the acts or omissions of his agent. The loss or damage need not be directly or immediately caused by the act which is done or is omitted to be done. It will be sufficient if it be fairly attributable to it, as a natural result or a just consequence." The above, in substance, is quoted and approved in *Walker v. Walker*, 5 Heisk. 427. The same author, after citing cases where the agent was held liable for violation of duty, although other causes intervened to produce the injury, says (section 219): "In all these cases, although the misconduct or negligence of the agent is not the direct and immediate cause of the loss, yet it is held to be sufficiently proximate to entitle the principal to recover for the loss or damage; for otherwise the principal would ordinarily be without remedy for such loss or damage, since the same objection would apply in almost all cases of this sort." Wharton on Agency, § 253, says: "If loss was immediately attributable to *casus*, or the intervention of third parties, yet this constitutes no defence, if the principal was exposed to such *casus* or intervention by the agent's misconduct. . . . The supervening loss must in some way be connected with the fault, either as creating the loss as a cause, or as determining the incidence of some other cause of loss." Sutherland on Damages (volume 3, p. 91) says, in regard to liability of agents for violation of instructions of principal, as follows: "The instructions may relate to measures deemed expedient by the principal to secure himself against a contingent or possible loss. If these instructions are disregarded, the agent will not be heard to say that he is not liable by reason of the uncertainty of the loss, if it happens, for it is a loss in contemplation of the parties. The instructions were intended to make exemption from such possible loss certain. After the disregard of such instructions, the loss, when it occurs, is morally the direct consequence of the agent's breach of duty, whatever may be the immediate physical cause."

It is said that this principle cannot be applied in this case because Powell's injury must have occurred through some negligence of complainant, for otherwise complainant could not be liable to him; and that such negligence, and not the act of Greer, was the proximate cause of injury as between him and the company. Defendant's act was proximate cause of injury as between him and the company. self and contributing to the loss of complainant, cannot be held liable to complainant where its negligence was concurrent and contributed to the injury. Railroad companies operate trains by subordinate officers and servants. Though there may be no negligence on the part of its controlling officers, it is nevertheless answerable to injured parties for the negligence of its subordinate officers and servants, under the doctrine of *respondere superior*, just the same as if it were an individual, and had, as such, been personally guilty of the negligence complained of. Freight trains are not adapted to the carrying of persons, either with speed, safety, or convenience. The hazard is far greater upon them than upon passenger trains, which are specially designed and operated for transporting persons. This division in the manner of performing railway service is based upon practical experience, which has demonstrated that it is in the interest of both the carrier and general public. It is general in all countries where railways have reached an advanced stage of development. Complainant has limited the use of its freight trains, except in cases where special permit is given, to the transportation for which they are designed; and, in view of the greater risk to life and limb upon such trains, and the consequent liability, it imposed upon defendant the duty of excluding persons from the train of which he was conductor, and of preventing the consummation of the contractual relation of common carrier with its attendant liability. The risks intended to be guarded against may have been, and most probably were, those which might result from the negligence of its own servants. If, being aware of these hazards arising from the necessary employment of a great number of servants, and wishing to guard against them, it contracted with defendant and paid him to perform a duty which would have effectually protected complainant from any liability to Powell, and if defendant may, as is contended, wilfully violate his contract, and annul with impunity the obligations of his employment, and create for complainant the very contractual relation he agreed to prevent, then a case would be presented of a wrong without a remedy, and a breach of contract without liability, and an abortive though careful effort to guard against danger, with no power to avoid the consummation of a contract entailing liability and loss, and no redress for the dereliction of the agent who, in violation of his duty, created the relation from which the contract followed as a direct legal consequence.

The conductor, in violation of his duty, placed Powell in the position where he was injured, and, if such injury was the result and accident caused by the negligence of complainant's other servants, he thus, by defendant's act, acquired the right to recover damages from complainant. The negligence of the company's other servants in causing the accident would not have injured Powell but for the misconduct of defendant. But for the act of defendant the train might have been annihilated through the negligence of complainant's other servants, and yet no injury could have been sustained by Powell. While Powell had no right of action against defendant, and as between Powell and complainant the negligence of complainant was the proximate cause of the injury, yet, as between complainant and defendant, the wrongful act of defendant was the proximate and efficient cause of loss to complainant should it have to pay Powell. As this was in violation of his duty to his principal, defendant should answer for loss sustained. Such injuries and losses were within the contemplation of his contract, and the rule which was known to him put him fully on his guard. He assumed the risk himself when he violated it. He cannot admit that he has breached his contract in failing to protect complainant from losses occasioned by the negligence of its other servants, which he might have done by the performance of a simple duty, but deny that he can be held liable, on the ground that the negligence of such servants, as between complainant and Powell, is in law imputable to complainant. The obligation imposed by a rule of law upon complainant as to third parties has nothing to do with the contractual responsibility of defendant. The effect of such a rule as is contended for would be to deprive a corporation absolutely of the benefit of a contract having for its purpose the employment of an agent to protect it, by guarding it, in a way fully within his power, against the establishment of conditions which bring strangers within the radius of injuries that may accrue through the negligence of its other servants.

It is further argued that, as both complainant and defendant were neglectful, complainant cannot sustain this action, because there can be no contribution between wrong-doers. They do not occupy this relation to each other, for, if they did, then Powell would have had a right of action against Greer, which he did not, as Greer had done him no wrong. He, by virtue of his agency, put him under the protection of his principal, with its legal consequences, and that is what is now complained of. It is not contribution, but indemnity, that is asked for from an agent, for a loss occasioned by his misconduct. The action is for a breach of contract, and not against a co-tort-feasor.

Claim is not
for contribu-
tion from joint
tort-feasor.

The chancellor dismissed the bill on the ground that it could not be sustained under any head of equity jurisdiction except that of equitable set-off, and that the essential element of a present subsisting claim is wanting, and hence complainant has no remedy, however meritorious his right may eventually turn out to be. It is true that complainant has no present fixed demand, and it may defeat Powell, and hence never have one; but if the allegations of the bill be true as to the contract with defendant, and his violation of duty, then it is manifest that complainant, in litigating the claim of Powell in Mississippi, is making a contest in the interest of defendant. The action of complainant which redounds to benefit of defendant is urged as a ground for destroying the only means of indemnity left to complainant. The allegation in the bill, that the right of Powell is denied, and that it is and will be contested in the interest of this defendant; for, if complainant had admitted unconditionally in this bill its liability to Powell, then such admission might have been used in the suit pending in Mississippi. It appears, therefore, in this case, that, while complainant might have paid the claim of Powell, and thus have acquired such a subsisting right against defendant as would have justified impounding the fund until it could have been adjudicated, it has pursued a course which is far more to the interest of defendant, and is making a fight in his behalf. The peculiar relations between the parties, growing out of the facts surrounding the demand, might justify the application of the doctrine of equitable set-off; for, as stated in *Parker v. Britt*, 4 Heisk. 249, "courts of equity will extend the doctrine of set-off . . . in all cases where peculiar equities intervene between the parties."

The bill will lie as a *quia timet* bill to prevent irreparable injury on account of the insolvency of defendant. Such a bill was sustained when it was brought by a vendee to enjoin the sole devisee of his vendor from disposing of the devised property, upon the allegation that he had been sued for the land purchased, and might lose it by a paramount title, and that if the property should be aliened he would have no remedy on his warranty, and thus would suffer irreparable injury. *Baird v. Goodrich*, 5 Heisk. 20. In that case the land had not been lost, and might never be, but the bill was sustained as a *quia timet* bill, notwithstanding the right to sue at law upon the covenant of seisin unembarrassed. It has been held that a surety, when his principal is insolvent, may proceed against him before paying the debt. *Miller v. Speed*, 9 Heisk. 200, 201, and cases there cited; *Henry v. Compton*, 2 Head, 549. And so the doctrine is stated in 3 Pom. Eq. Jur. § 1417. Complaint is not a surety of defendant, and there is no

Quia timet bill
lies.

privity between defendant and Powell, and yet it is answering for the default of defendant—a default in respect of which defendant is primarily liable to it, the same as he would be under a contract of suretyship. As between them, their obligation stands on as high ground, and rights under it should be protected to the same extent. It would be contrary to natural justice to permit Greer, who is insolvent, to collect his entire judgment from defendant, and make way with the money, and by the interposition of such defences, defeat the right, and leave complainant to pay Powell for an injury occasioned by Greer's wrongful act, and in violation of his contract, which was to protect complainant against the possibility of answering for such accidents to passengers. Defendant has collected all of the money, and has given a refunding bond for \$10,000, and it right that it should remain in force.

The decree of the chancellor is reversed, the demurrer is overruled, the refunding bond remains in full force and effect, and the cause is remanded for further proceedings.

ATCHISON, TOPEKA AND SANTA FE R. CO.

v.

RANDALL.

(40 Kan. 421.)

Master and Servant—Liability for Acts of Servant—Scope of Servant's Authority.—The master is responsible for the act of his employee or servant, when the act is done in the prosecution of the business that the employee or servant was engaged by the master to do. When, therefore, the employee or servant, while engaged in the prosecution of the master's business, deviates from his instructions as to the manner of doing it, this does not relieve the master from liability for his acts.

Same—Assistance employed by Servant—Instructions—Liability of Company.—Through an unavoidable accident, a cattle train was derailed, and, to clear away the wreck, it was necessary to release the cattle from two or three of the cars. Some of the cattle so released escaped from control, and ran over the public highway, and through adjoining fields. The railroad's claim agent, whose duty it was to look after the cattle and see that they were returned to the company for reloading, was present at the wreck. He instructed the section foreman to get some men to collect the cattle together and reload them. The foreman employed a young man to assist in rounding up and driving back the cattle, and told him to get a horse, if he had one, to aid in their work. The young man took the horse of his father, without the latter's knowledge or consent, and

used the same in collecting and driving back the cattle to the cars. While being used in the service of the company, the horse was severely gored and injured by one of the cattle. *Held*, that as the section foreman and young man were acting in the company's business, although in taking and using the horse they were beyond their instructions, the company is liable for the damages to the horse.

ERROR to District Court, Johnson County.

On the 20th day of September, 1886, J. D. Randall filed his petition against the Atchison, Topeka & Santa Fe R. Co., in the district court of Johnson county, in the words and figures following, to wit, [omitting caption:] "And now comes the plaintiff, and, for his cause of action against the defendant herein, states that the said defendant, the Atchison,

Petition. Topeka & Santa Fe R. Co., was at the date of the grievances hereinafter complained of, has ever since been, and is now, a corporation, duly authorized and acting under and by virtue of the laws of the state of Kansas, and operating its line of railroad through said county; that on October 16, 1884, defendant was transporting over its line of road through Cedar Junction, in said county, as a common carrier, a large number of Texas steers, animals which are, as a class, of an ugly, dangerous, and vicious disposition, from some point on its road, to plaintiff unknown, to Kansas City, Mo.; that, while so transporting said steers, the defendant, at Cedar Junction, allowed some of them to escape from the cars, and to gore, hook, and injure a certain valuable mare belonging to this plaintiff; whereby this plaintiff has been damaged in the sum of \$75.00 in medicines, care, and attendance in attempting to cure said mare, and also in the further sum of \$150.00 in deterioration of the value of said mare. Wherefore this plaintiff prays judgment against the said defendant for the sum of \$150.00 and for costs of suit. (2) Plaintiff, for his second cause of action against defendant herein, states that the said defendant, the Atchison, Topeka & Santa Fe R. Co., was at the date of the grievances hereinafter complained of, has ever since been, and is now, a corporation, duly organized and acting under and by virtue of the laws of the state of Kansas, and operating its line of railroad through said county; that on October 16, 1884, defendant was transporting over its line of road, through Cedar Junction, in said county, as a common carrier, a large number of Texas steers, which were and are, as a class, of an ugly, dangerous, and vicious disposition, from some point on its road to plaintiff unknown, to Kansas City, Mo. Plaintiff says that defendant, through the carelessness of its agents and servants in not properly turning the switch near Cedar Junction, caused some of the cars in which said steers were being transported, as aforesaid, to be broken open, so that

some of the steers escaped therefrom, and that the defendant, through its agents and servants, carelessly and negligently allowed said steers to escape from their custody, and to run at large through the town of Cedar Junction and the neighboring highways and commons; and, while so at large, one of the said steers did, on the said 16th day of October, 1884, run against, gore, and injure a valuable mare, the property of this plaintiff, while in the public streets of the said village of Cedar Junction; whereby this plaintiff has been damaged in the sum of \$75.00 in medicines, care and attendance in attempting to cure said mare, and also in the further sum of \$150.00 in deterioration of the value of said mare. Wherefore plaintiff prays judgment against said defendant, the Atchison, Topeka & Santa Fe R. Co., in the sum of \$150.00, and costs of suit. (3) Plaintiff, for his third cause of action against defendant herein, states that the said defendant, the Atchison, Topeka & Santa Fe R. Co., was at the date of the acts hereinafter complained of, has ever since been, and is now, a corporation, duly organized and acting under and by virtue of the laws of the state of Kansas, and operating its line of railroad through said county; that on October 16, 1884, plaintiff was the owner of a valuable mare, which the defendant, through its agents and servants, took from plaintiff's premises, and employed in and about their business at Cedar Junction, Kan. Plaintiff says that the taking and employment of said mare, as aforesaid, were without his knowledge or consent. Plaintiff further says that, while so employed by said defendant, his said mare was gored and wounded by a steer, and that by reason of said acts of defendant he has been damaged in the sum of \$75.00 in procuring medicines in attempting to cure said mare, and that he has been damaged in the further sum of \$150.00, in deterioration in the value of said mare by reason of said injuries. Wherefore plaintiff prays judgment in the sum of \$150.00, and costs of suit. J. W. PARKER and F. N. HAMILTON, Attorneys for Plaintiff." On the 16th day of October, 1886, the railroad company filed the following answer: "Now comes the defendant in the above-entitled cause, and for answer to plaintiff's petition denies each and every allegation therein contained. For a second and further defence, the defendant says that the animals which it was transporting as a common carrier at the time of the accident complained of by plaintiff were of the class known as 'domestic animals'; that the defendant had no knowledge or means of knowledge of said animals, or any of them, being of an ugly, dangerous, and vicious disposition, to a greater extent than any domestic cattle. The defendant therefore prays judgment for costs. GEO. R. PECK, A. A. HURD, F. R. OGG, Attys. for Defendant." Subsequently the plaintiff filed a reply

Answer.

denying every allegation in the answer inconsistent with the petition. Trial was had at the May term of the court for 1887, before the Honorable JOHN T. LITTLE, judge *pro tem.*, a jury being waived. The court made and filed the following conclusions of fact: (1) That the defendant is a common

Findings of fact.

carrier, operating a railway within and through the county of Johnson and state of Kansas. (2) That in the month of October, 1884, the defendant was transporting on its cars a mixed lot of Texas and Colorado steers through said county, to Kansas City, Mo. (3) That at Cedar Junction, in said county, without any fault of the defendant, the cars became derailed, and the defendant's servants opened the doors, and negligently permitted said steers to wander over and through the streets, and on the common, in and through said Cedar Junction. (4) That defendant, by its servants, ordered the section foreman to get and bring said steers up for reloading. (5) That Sam Randall, a son of the plaintiff, at the request of said foreman, procured the horse in controversy from his father's stable, without his consent, and, in driving said steers to the train, one, a Texas steer, rushed upon the horse, and gored and wounded him in the side. The mare was the absolute property of plaintiff. (6) That plaintiff nor his son in any manner contributed to the injury of the horse. (7) That, when defendant's servants turned said steers out of the cars, they were negligent in not retaining them, as they might have done, near the cars, and within their own enclosure. (8) That by the negligence of defendant's servants the plaintiff sustained the damage complained of. (9) The damage sustained by plaintiff for the injury of the horse alone was \$137.50. (10) That Texas steers are naturally vicious, and, when permitted to run at large, are dangerous. (11) That after the wreck it was necessary to uncar said cattle for their own protection, and to clear the wreck. And thereon the court found, as a conclusion of law, that there was due to the plaintiff from the defendant, as damages to said mare, the sum of \$137.50. Judgment was subsequently entered in favor of the plaintiff, and against the defendant, for that amount, together with all costs. The railroad company excepted and bring the case here.

Geo. R. Peck, A. A. Hurd, and F. R. Ogg for plaintiff in error.
Parker & Seaton for defendant in error.

HORTON, C.J.—It appeared upon the trial in this case that on the morning of October 16, 1884, through an unavoidable accident, a cattle train upon the road of the Atchison, Topeka & Santa Fé R. Co. was derailed near Cedar Junction, in Johnson county, and two or three of the cars thrown from the track; that, in order to clear the wreck, it was

Facts.

necessary to let out the cattle from some of the cars, and these were driven into a sort of pocket in the fences along the right of way; that while the men were engaged in clearing away the wreck and getting the cars upon the track, some of the cattle escaped out of the pocket, running through the streets of the Junction, and on the hill-side, in the brush; that they were at large for the space of four hours,—it having taken that time to clear the wreck away; that C. M. Foulks, the railroad's claim agent, was present at the wreck, and that it was his duty, together with those he might employ, to look after the cattle, and return them to the control of the company; that Mr. Foulks instructed the section foreman, Joe Landry, "to get some men, and we would drive those cattle around, and take them up and reload them;" that Landry saw Samuel Randall, the son of J. D. Randall, the plaintiff, upon the street; that he asked him "if he would go and hunt the cattle and get them in the corral;" that he also asked him "if he had a horse to ride;" that he answered, "He had;" that young Randall procured his father's young mare without leave or license, and assisted the other employees in recovering and driving back the cattle; that after being driven back to the cars, but before the cattle were reloaded, one of them (a Texas or Colorado steer), being excited and angry, ran against and gored severely the mare belonging to plaintiff. Afterward Samuel Randall was paid by the railroad company for his work in assisting in recovering and driving the cattle. Subsequently the plaintiff brought his action against the railroad company to recover for the injury to his mare, alleging, among other things, that the taking and employing of his mare were without his knowledge and consent, and that he was damaged in the sum of \$75 in procuring medicines and attention for the mare, and in the further sum of the \$150 for the deterioration in the value of the mare by reason of her injuries. The case was tried to the court without a jury, and judgment rendered against the defendant for \$137.50, together with all costs. We think it unnecessary to refer to the first and second counts of the petition, and therefore shall confine ourselves to the question whether, upon the undisputed evidence, the railroad company was responsible, under the allegations of the third count, for the damages recovered.

On the part of the railroad company it is contended that Landry, the section foreman, had no authority to hire or use the mare, and therefore that the employment of the plaintiff's son, with the mare, was beyond his authority, and that the railroad company is not responsible for this act, and therefore not liable for the use of the mare in driving up the cattle, or for her being brought near the wreck where she was injured. Under the

Defendant's
responsibility
for employ-
ment of plain-
tiff's son.

evidence in the case, Landry and young Randall were the employees or servants of the railroad company. They were, at the time the mare was taken, used, and injured, engaged in the service of the railroad company. There is no pretence that either Landry or Randall was endeavoring to do anything for themselves. It is scarcely possible that young Randall could have used the mare as he did, in rounding up and driving the cattle, without being seen by Mr. Foulks, who had full authority to represent the company. The horse used by Randall was useful in recovering and driving the cattle, and all of the acts done by Landry and Randall were done by them in the prosecution of the business of the company. It is not to be relieved because Landry departed from his instructions in collecting and driving the cattle. The test of the master's responsibility for the act of his servant is not whether the act was done according to the instructions of the master to the servant, but whether it was done in the prosecution of the business that the servant was employed by the master to do. It is true, that Mr. Foulks instructed Landry to get men, not horses, to assist in driving and reloading the cattle; but young Randall did not know the limit of Landry's instructions. He acted upon the request of Landry, and his acts, as well as those of Landry, were in the furtherance of the company's business. None of the employees or servants of the company objected to the use of the mare, and, as the cattle were scattered about in various directions for half a mile, the use of the mare was beneficial and necessary. Landry, for the benefit of the company, directed young Randall to get the mare, and the company is responsible, although the act of Randall was wrongful in taking the mare without his father's knowledge or consent.

"To make the corporation responsible it is not necessary, as plaintiffs in error contend, that the principal should have directly authorized the particular wrongful act of the agent, or should have subsequently ratified it. Judge Story, in treating of the liability of principals for the acts of their agents, says that 'the principal is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent, in the course of his employment, although the principal did not authorize or justify or participate in or indeed know of such misconduct, or even if he forbade the acts or disapproved of them.' And to sustain this he cites numerous authorities. 'In all such cases,' he says, 'the rule applies, *respondet superior*, and it is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings either directly with the principal, or indirectly with him, through the instrumentality of

agents." Story Ag. § 452; Wheeler & Wilson Manuf. Co. v. Boyce, 36 Kan. 350, 17 Am. & Eng. Corp. Cas. 55; Ochsenbein v. Shapley, 85 N. Y. 214; Cosgrove v. Ogden, 49 N. Y. 255; Garretzen v. Duenckel, 50 Mo. 104. The mare of the plaintiff was taken from a place of security, and brought by the employees of the railroad company, for the use of the company, into a place of danger, and there was injured without the fault or negligence of the owner. For the damages resulting from the injury the company is liable, because we have already held that the company is liable for the acts of Landry and young Randall done in rounding up, driving, and reloading the cattle. With the views expressed, the other matters discussed in the briefs need not be examined or decided. The judgment of the district court will be affirmed. All the justices concurring.

CHRISTIAN

v.

COLUMBUS AND ROME R. CO.

(79 Ga. 460.)

Master and Servant—Homicide by Station Agent—Liability of Company.—

A railroad company is liable in damages for the wrongful homicide of its customer committed by its depot agent in his office while the customer was lawfully there for the transaction of business with such agent appertaining to his agency. This results from the Code, § 3033, which renders all railroad companies liable for damages done by any person in their employment and service unless their agents have exercised all ordinary care and diligence.

Same—Servant's Insanity—Knowledge of Employer.—While, as a general rule, any mental disease or infirmity which would excuse the agent from criminal responsibility would also excuse the company from civil responsibility, this would not be available if the company employed the agent and assigned him to duty with knowledge of his insane condition, or of his being subject to sudden fits of insanity.

Same—Jurisdiction of Action—Locus of Act.—No matter where the contract of employment by the company with the agent was made, the homicide being committed at the place where the agent was assigned to duty, and where he was serving the company at the time of the wrongful act, the cause of action originated at that place, and the superior court of that county has jurisdiction. (Ga. Code, § 3406; Georgia R. Co. v. Oaks, 52 Ga. 410.)

ERROR from Superior Court, Harris County.

L. F. Garrard for plaintiff in error.

Peabody, Brannon & Battle for defendant in error.

BLECKLEY, C.J.—Mrs. Christian brought her action against the Columbus & Rome R. Co., a corporation in this state, for the homicide of her husband. The declaration alleges that her husband, while in the agent's office for the transaction of business pertaining to the agency, the business of the husband with the company, was killed by the agent; and it alleges moreover, that the agent was subject to disease and aberration of mind, and that the company employed him knowing that fact. His disease was, or became at intervals, homicidal mania. The declaration was demurred to on two grounds: (1) as not setting out any cause of action; and (2) as not showing jurisdiction of the court, the action being brought in Harris county, where the homicide was committed, and not in Muscogee county, where the charter located the principal office of the corporation. The demurrer was sustained and the suit dismissed.

1. With respect to the cause of action, we hold that under the Code, § 3033, a railway company is liable for any damage done by any person in its employment and service unless the agents of the company have exercised all ordinary and reasonable care and diligence. This is the express provision of the Code, and is founded, not upon the act 1855-6 (as indicated in the margin), but upon the act 1853-4. We think that while the act of 1853-4 may not have been intended originally to be so broad, and may have contemplated a restriction to injuries resulting from the running of trains, etc., the codifiers extended it to all damages caused by persons in the employment and service of railroad companies, whether engaged in running trains, etc., or not; and this provision of the Code has been adopted as law by the constitution, and is law now. So that, if the agent killed this lady's husband wrongfully, the company is liable for it, under the facts alleged in this declaration.

2. We think also that, if the homicide was the result of insanity and the railroad company was faultless in regard to employing the agent, anything that would excuse the agent criminally from the act would excuse the railroad company civilly. But this declaration alleges that the railroad company employed him knowing his infirmity; and that of course subjects the company to the consequences, if it be true. Their employment of an improper person, to come in contact with the public as their agent, would be gross misconduct.

3. With respect to the question of jurisdiction, it was insisted, as the contract between the company and the agent was made in Harris county, or, at all events, as it did not appear that it was made there, there was no jurisdiction save in Muscogee county,

Liability of company for act of insane agent.

Insanity will excuse company if it was without fault in employing agent.

where the principal office of the corporation is located. We think otherwise. No matter where that contract was made, the agent was put to serve the company in Harris county; and the act done by the agent there was the cause of action. The cause of action was not the contract of employment of the agent, but what he did after being employed; and it has been ruled by this court, in *Georgia R. Co. v. Oaks*, 52 Ga. 410, that a widow suing for the homicide of her husband may bring her action in the county in which the homicide was committed. Code, § 3406. The head-notes are to be read as a part of this opinion. Judgment reversed.

Jurisdiction
of action.

ANDERSON *et al.*

v.

STATE.

(*Texas Court of Appeals, February 2, 1889.*)

Negligent Homicide—Indictment—Sufficiency—Failure to Observe Person on Track.—An indictment charging substantially that those in charge of an engine and tender did back the engine and tender carelessly, without giving any warning, and without first looking out for persons on the track, and by said negligence and carelessness one M. was struck and killed, and that his danger might have been discovered by the defendants by the exercise of reasonable care, sufficiently charges an offence under Tex. Pen. Code, art. 579, which declares the killing of any person by negligence and carelessness in the performance of a lawful act to be punishable as negligent homicide.

Same—Brakemen—Duty to Look Out for Obstructions.—Brakemen travelling upon an engine and tender in the discharge of their duties are under no legal duty to look out for persons and obstructions on the track, and are not guilty of negligent homicide by reason of the fact that they might have observed a child upon the track previous to its being struck and killed.

APPEAL from Circuit Court, Polk County.

Indictment against O. Torgerson, engineer, J. A. De Cogne, fireman, and Alexander Anderson and Joe Woods, brakemen, in the employment of the Houston, East & West Texas R. Co., for negligent homicide of the first degree, alleging substantially that on February 7, 1887, while engaged as workmen in running an engine and tender on said railroad, said Torgerson, De Cogne, Anderson, and Woods did back said engine and tender negligently and carelessly, without ringing the bell or blowing the whistle, and without giving any warning,

Indictment.

and without first looking to see if any person was likely to be injured thereby, and by said negligence and carelessness one Sing Morgan was struck by said engine and tender, so run, and the death of said Morgan was caused by said negligence and carelessness—the said Morgan being at the time in a position to be struck by said engine and tender, which fact would have been known by said Torgerson, De Cogne, Anderson, and Woods if they had used that degree of care and caution which a man of ordinary prudence would use under like circumstances, there being then and there an apparent danger of causing the death of said Morgan and of other persons passing on said railroad and highway. Torgerson, engineer, and De Cogne, fireman, not having been arrested, the appellants Anderson and Woods, brakemen, were put on trial, pleaded not guilty, waived a jury, and submitted the case to the court. Judgment was rendered finding appellants guilty of negligent homicide of the first degree and assessing their punishment at a fine of \$250 each. Motion for new trial was made and overruled, and the defendants appealed.

The statute under which the indictment was found is as follows: "If any person in the performance of a lawful act shall by negligence and carelessness cause the death of another, he is guilty of negligent homicide of the first degree." Tex. Pen. Code, art. 579.

R. S. Lovett for appellants.

W. L. Davidson, Asst. Atty.-Gen., for the State.

WILSON, J.—This appeal is from a conviction of negligent homicide in the first degree. The indictment charges the appellants and two other persons, jointly, with the commission of the offence. Appellants only were put upon trial, and the punishment assessed was a fine of \$250 against each of them. We think the indictment is a good one. It follows the statute defining the offence, and alleges all the elements of the offence, setting forth specifically the acts and omissions of the defendant, alleging that said acts and omissions caused the death of the deceased. Penn. Code, art. 579. It was not error to refuse to permit De Cogne to testify in behalf of the defendants. It was made to appear by the state that said De Cogne was one of the persons jointly charged with defendants with the same homicide, but charged under a different name, the true name of said De Cogne having been mistaken by the grand jury presenting the indictment. Said De Cogne was an incompetent witness in behalf of defendants, he being in fact a principal in the offence, and in reality, but under another name, charged as such in the indictment. Code Crim. Proc. art. 731.

**Indictment
held to be suf-
ficient.**

As we view the evidence and the law applicable thereto, this conviction is not warranted. These appellants were brakemen. They had no control whatever of said engine and tender. They were riding upon the same for the purpose merely of performing their specific duties as brakemen, which duties had no connection with or relation to the homicide. It was the exclusive duty of the engineer and fireman to operate said engine carefully; to look out for obstructions on the track; to give signals of danger when necessary. With these duties appellants were in no way concerned. They had no right to start the engine in motion, to blow the whistle, to ring the bell, to stop the engine, or otherwise to control its movements. They performed no act which connected them with the death of the child. It is only for a supposed omission of duty on their part that they have been convicted of negligent homicide: they omitted to look out for obstructions on the track. They might have seen the child in time to save its life, but they omitted to see him; or, if they did see him, they omitted to stop the train, or to signal the engineer to stop it. Were these omissions criminal, within the meaning of the statute defining negligent homicide? We think not; because to constitute criminal negligence or carelessness, there must be a violation of some duty imposed by law, directly or impliedly, and with which duty the defendant is especially charged. Mr. Wharton says: "Omissions are not the basis of penal action unless they constitute a defect in the discharge of a responsibility with which the defendant is especially invested." Whart. Hom. § 72. Again, this author says, in treating of omissions by those charged with machinery, etc.: "The responsibility of the defendant, which he thus fails to discharge, must be exclusive and peremptory. A stranger who sees that, unless a railway switch is turned or the car stopped, an accident may ensue, is not indictable for not turning the switch or stopping the car. The reason for this is obvious. To coerce by criminal prosecution every person to supervise all other persons and things would destroy that division of labor and responsibility by which alone business can be safely conducted, and would establish an industrial communism by which private enterprise and private caution would be extinguished. Nothing can be effectually guarded when everything is to be guarded by everybody. No machinery could be properly worked if every passer-by were compelled by the terror of a criminal prosecution to rush in and adjust anything that might appear to him to be wrong, or which was wrong, no matter how it might happen to appear. By this wild and irresponsible interference even the simplest forms of machinery would be speedily destroyed." Id. § 80. And upon the subject of omission to give warning of danger, the

Brakemen not
being bound to
keep look-out,
are not guilty.

same author says: "The test here is, Is such notice part of an express duty with which the defendant is exclusively charged? If so, he is responsible for injury which is the regular and natural result of his omission; but if not so bound, he is not so responsible." *Id.* § 81. These rules of the common law are not inconsistent with our statute, but are in harmony therewith, as we construe it.

As we understand both the common law and the statute, there can be no criminal negligence or carelessness by omission to act unless it was the especial duty of the party to perform the act omitted. Negligence or carelessness by omission presupposes duty to perform the act omitted, and cannot in law be imputed except upon the predicate of duty. In this case the evidence is uncontradicted and clear that appellants did not do any act or omit to do any legal duty with reference to the deceased child. In law they are no more responsible for the death of the child than any other person who was present and witnessed the accident. They were strangers to the transaction, in contemplation of the law, because they were not charged with any duty with respect to it. We are of opinion that the conviction is contrary to the law and the evidence, and therefore the said judgment is reversed and the cause remanded.

Criminal Liability of Railway Servants.—The general rule is that every person placed in a situation in which his act may affect the safety of others must take all precautions to guard against risk to them arising from what he is doing. A failure to do this, resulting in death to another, is manslaughter. *In re Piton*, 2 Broun (Sc.), 525. When a collision occurs on a railway and death is caused, the person responsible is the man actually in charge of the engine, and whose negligence caused the accident at the time of the collision. *Reg. v. Birchall*, 4 F. & F. 1087. A telegraph officer of a railway was charged with manslaughter, or culpable neglect of duty, in so far as he had neglected to turn on a certain signal, and in consequence of that neglect a collision took place by which one person was killed and several others severally injured. A conviction under the indictment was sustained. *In re Rowbotham*, 2 Irvine (Sc.), 89.

Where a fatal railway accident had been caused by the train running off the line at a spot where rails had been taken up without allowing sufficient time to replace them, and also without giving sufficient, or, at all events, effective, warning to the engineer, and it was the duty of the foreman of plate-layers to direct when the work should be done, and also to direct effective signals to be given, it was held that, although he was under the general control of the inspector, the inspector was not liable, but that the foreman was, assuming his negligence to have been a material and a substantial cause of the accident, even although there had also been negligence on the part of the engine-driver in not keeping a sufficient lookout. *Reg. v. Bengé*, 4 F. & F. 504.

Upon a trial for manslaughter, it appeared that the prisoner was the driver and the deceased was the fireman of a locomotive on a railway, and that the death of the latter was caused by the engine coming into collision with a train standing on the same line, owing to a neglect on the part of the person in charge of the engine to keep a sufficient lookout. There

was evidence that it was the duty of the prisoner or of the deceased to keep a lookout; but there was no evidence as to which of the two was charged with the duty at the time of the collision. *Held*, that the prisoner was entitled to an acquittal. *Reg. v. Gray*, 4 F. & F. 1098.

On an indictment against an engine-driver and a fireman of a railway train for manslaughter of persons killed while travelling in a preceding train, by the prisoner's train running into it, it appeared that on the day in question special instructions had been issued to them, which in some respects differed from the general rules and regulations, and altered the signal for danger so as to make it mean not "stop," but "proceed with caution;" that the trains were started by the superior officers of the company irregularly at intervals of about five minutes; that the preceding train had stopped for three minutes without any notice to the prisoners except the signal for caution; that their train was being driven at an excessive rate of speed, and that then they did not slacken immediately on perceiving the signal, but almost immediately; and that, as soon as they saw the preceding train, they did their best to stop but without avail. *Held*, that the special rules, in so far as not consistent with the general rules, superseded them; that if the prisoners honestly believed they were observing them and they were not obviously illegal, they were not criminally responsible; and that the fireman, being bound to obey the directions of the engine-driver and, so far as appeared, having done so, there was no case against him. *Reg. v. Trainer*, 4 F. & F. 105. See also *Reg. v. Ledger*, 2 F. & F. 857.

By 24 and 25 Vict. c. 100, § 34, whosoever by any unlawful act or by any wilful omission and neglect shall endanger or cause to be endangered the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable at the discretion of the court to be imprisoned for any time not exceeding two years, with or without hard labor. This provision superseded 3 and 4 Vict. c. 97, § 15, which was substantially the same, except that it did not provide for any omission or neglect. In *Reg. v. Pardenton*, 6 Cox C. C. 247, it was held that the neglect of the driver and fireman of a railway engine to keep a good lookout for signals according to the rules and regulations of the company, in consequence of which the collision occurred and the safety of passengers was endangered was not an offense within 3 and 4 Vict. c. 97, § 15.

MINNEAPOLIS AND ST. LOUIS R. CO.

v.

BECKWITH.

(129 U. S. 26.)

Fences—Stock-killing—Double Damages—Constitutional Law—Equal Protection of the Law.—A statute which provides that, when railroad companies have the right to fence their tracks but fail to do so, they shall be liable for live stock killed or injured by reason of the want of such fence unless the same was occasioned by the wilful act of the owner; that, in order to recover, it shall only be necessary for the owner to prove the in-

jury or destruction of his property; and that, if the company fails to pay the value of or damage done to the stock within thirty days after notice of the loss, it shall be liable in double the value of the stock killed or injured,—does not deny to railroad companies the equal protection of the law within the meaning of the XIVth amendment of the Federal Constitution, the statute being applicable to all railroad companies.

Same—Double Damages—Police Power—Due Process of Law.—The provision of the act imposing liability for double damages for failure to fence is a valid exercise of the police power of the state, and is not a deprivation of property without due process of law within the meaning of the constitutional prohibition.

IN error to the Circuit Court of Kossuth County, State of Iowa.

Eppa Hunton for plaintiff in error.

FIELD, J.—This case comes before us from the circuit court of Kossuth county, Iowa, the highest court of that state in which the controversy between the parties could be Case stated. determined. Rev. St. §709. It was an action for the value of three hogs run over and killed by the engine and cars of the Minneapolis & St. Louis R. Co., a corporation existing under the laws of Minnesota and Iowa, and operating a railroad in the latter state. The killing was at a point where the defendant had the right to fence its road. The action was brought before a justice of the peace of Kossuth county. Proof having been made of the killing of the animals, and of their value, and that notice of the fact, with affidavit of the injury, had been served upon an officer of the company in the county where the injury was committed more than 30 days before the commencement of the action, the justice gave judgment for the plaintiff against the company for \$24, double the proved value of the animals. The case was then removed to the circuit court of Kossuth county, where the judgment was affirmed. To review this latter judgment the case is brought here on writ of error.

The judgment rendered by the justice was authorized by section 1289 of the Code of Iowa, which is as follows: “Any corporation operating a railway, that fails to fence the Iowa statute. same against live stock running at large at all points where such right to fence exists, shall be liable, to the owner of any such stock injured or killed by reason of the want of such fence, for the value of the property or damage caused unless the same was occasioned by the wilful act of the owner or his agent; and in order to recover, it shall only be necessary for the owner to prove the injury or destruction of his property; and if such corporation neglects to pay the value of or damage done to such stock within thirty days after notice in writing, accompanied by an affidavit of such injury or destruction, has

been served on any officer, station or ticket agent employed in the management of the business of the corporation in the county where the injury complained of was committed, such owner shall be entitled to recover double the value of the stock killed or damages caused thereto." The validity of this law was assailed in the state court, and is assailed here, as being in conflict with the first section of the XIVth amendment of the Constitution of the United States, in that it deprives the railway company of property without due process of law, so far as it allows a recovery of double the value of the animals killed by its trains; and in that it denies to the company the equal protection of the laws by subjecting it to a different liability for injuries committed by it from that to which all other persons are subjected.

It is contended by counsel as the basis of his argument, and we admit the soundness of his position, that corporations are persons within the meaning of the clause in question. It was so held in *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 394, 396, 13 Am. & Eng. R. Cas. 182, and the doctrine was reasserted in *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 189, 22 Am. & Eng. Corp. Cas. 542. We admit also, as contended by him, that corporations can invoke the benefits of provisions of the Constitution and laws which guarantee to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it.

We will consider the objections of the railway company in the reverse order in which they are stated by counsel. And first, as to the alleged conflict of the law of Iowa with the clause of the XIVth amendment, ordaining that no state shall deny to any person within its jurisdiction the equal protection of the laws. That clause does undoubtedly prohibit discriminating and partial legislation by any state in favor of particular persons as against others in like condition. Equality of protection implies, not merely equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind. But the clause does not limit, nor was it designed to limit, the subjects upon which the police power of the state may be exerted. The state can now, as before, prescribe regulations for the health, good order, and safety of society, and adopt such measures as will advance its interests and prosperity. And to accomplish this end special legislation must be resorted to in numerous cases, providing against accidents, disease, and danger in the varied forms in which they may come. The nature and extent of such legislation will necessarily depend upon the judgment of the legislature as to the security needed by society.

Statute does not deny the equal protection of the law.

When the calling, profession, or business of parties is unattended with danger to others, little legislation will be necessary respecting it. Thus, in the purchase and sale of most articles of general use, persons may be left to exercise their own good sense and judgment; but when the calling or profession or business is attended with danger, or requires a certain degree of scientific knowledge upon which others must rely, then legislation properly steps in to impose conditions upon its exercise. Thus, if one is engaged in the manufacture or sale of explosive or inflammable articles, or in the preparation or sale of medicinal drugs, legislation for the security of society may prescribe the terms on which he will be permitted to carry on the business, and the liabilities he will incur from neglect of them.

The concluding clause of the first section of the XIVth amendment simply requires that such legislation shall treat alike all persons brought under subjection to it. The equal protection of the law is afforded when this is accomplished. Such has been the ruling of this court in numerous instances where that clause has been invoked against legislation supposed to be in conflict with it. Thus in *Barbier v. Connolly*, 113 U. S. 27, 7

Authorities examined. Am. & Eng. Corp. Cas. 640, it was objected that a municipal ordinance of San Francisco prohibiting washing and ironing in public laundries within certain designated limits of the city between the hours of 10 at night and 6 in the morning was in conflict with that amendment, in that it discriminated between laborers engaged in the laundry business and those engaged in other kinds of business, and between laborers employed within the designated limits and those without them. But the court held that the provision was merely a police regulation; that it might be a necessary measure of protection in a city composed largely of wooden buildings, like San Francisco, that occupations in which fires are constantly required should cease during certain hours at night, and of the necessity of such a regulation that municipal body was the exclusive judge; that the same authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits within which wooden buildings must not be constructed; and that restrictions of this kind, though necessarily special in character, do not furnish ground of complaint if they operate alike upon all persons or property under the same circumstances and conditions. "Class legislation," said the court, "discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application if within the sphere of its operation it affects alike all persons similarly situated is not within the amendment."

In *Soon Hing v. Crowley*, 113 U. S. 703, 7 Am. & Eng. Corp.

Cas. 646, an objection was taken to a similar ordinance of San Francisco that it made an unwarrantable discrimination against persons, engaged in the laundry business, because persons in other kinds of business were not required to cease from labor during the same hours at night. But, the court said, there may be no risks attending the business of others, certainly not as great as where fires are constantly required; and that specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon business of a different kind. "The discriminations which are open to objection," the court added, "are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the law."

In *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 22 Am. & Eng. R. Cas. 557, a statute of Missouri requiring every railroad corporation within it to erect and maintain fences and cattle-guards on the sides of its roads, where the same passed through, along, or adjoining inclosed or cultivated fields, or uninclosed lands, and, if it did not, making it liable in double the amount of damages to animals caused thereby, was assailed as in conflict with the XIVth amendment on the same grounds urged in the present case; namely, that it deprived the defendant of property without due process of law, so far as it allowed a recovery of damages for stock killed or injured in excess of its value, and also that it denied to the defendant the equal protection of the laws by imposing upon it a liability for injuries committed which was not imposed upon other persons. But the court said that authority for requiring railroads to erect fences on the sides of their roads, so as to keep horses, cattle, and other animals from going upon them, was found in the general police power of the state to provide against accidents to life and property in any business or employment, whether under the charge of private persons or of corporations; that in few instances could that power be more wisely or beneficently exercised than in compelling railroad corporations to enclose their roads with fences having gates at crossings, and cattle-guards; that they are absolutely essential to give protection against accidents in thickly-settled portions of the country; that the omission to erect and maintain them, in the face of the law, would justly be deemed gross negligence; and that if injuries to property are committed, something beyond compensatory damages might be awarded in punishment of it. Referring to the rule which prevails of allowing juries to assess exemplary or punitive damages

where injuries have resulted from neglect of duties, the court said: "The statutes of nearly every state of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple, the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The decisions of the highest courts have affirmed the validity of such legislation. The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress if the private interest were not supported by the imposition of punitive damages." And as to the objection that the statute of Missouri denied to the defendant the equal protection of the laws, the court said that it made no discrimination against any railroad company in its requirement; that each company was subject to the same liabilities, and from each the same security was exacted by the erection of fences, gates, and cattle-guards, when its road passed through, along, or adjoining inclosed or cultivated fields or uninclosed lands; and that there was no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances.

In *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 33 Am. & Eng. R. Cas. 390, a statute of Kansas providing that "every railroad company doing business in that state should be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage," was assailed on the ground that it was in conflict with the fourteenth amendment to the constitution, in that it deprived the company of its property without due process of law, and denied to it the equal protection of the laws. In support of the first position the company referred to the rule of law that prevailed previously in Kansas and some other states exempting from liability an employer for injuries to employees caused by the incompetency or negligence of a fellow-servant, and contended that the law of Kansas in creating, on the part of the railroad company, a liability in such cases not previously existing, in the enforcement of which their property might be taken, authorized the taking of property without due process of law, and imposed a special liability upon railway companies that was not imposed upon other persons, and thus denied to the former the equal protection of the laws. But the court answered that the law in question applied only to injuries subsequently committed, and that it would not be contended that the state could not prescribe the liabilities under which corpora-

tions created by its laws should conduct their business in the future, where no limitation was placed upon its power in that respect by their charters; that whatever hardship or injustice there might be in any law thus applicable to the future must be remedied by legislative enactment; that the objection that the railroad company was denied the equal protection of the laws rested upon the theory that legislation special in its character was within the constitutional inhibition, but that, so far from such being the fact, the greater part of all legislation was special, either in the objects sought to be attained by it or in the extent of its application; that when such legislation applied to particular bodies or associations, imposing upon them additional liabilities, it was not open to the objection that it denied to them the equal protection of the laws, if all persons brought under its influence were treated alike under the same conditions; that the hazardous character of the business of operating a railway called for special legislation, with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public, which was not required by the business of other corporations not subject to similar dangers to their employees; and that the legislation in question met a particular necessity, and all railroad corporations without distinction were subject to the same liabilities.

From these adjudications it is evident that the fourteenth amendment does not limit the subjects in relation to which the police power of the state may be exercised for the protection of its citizens. That this power should be applied to railroad companies is reasonable and just. The tremendous force brought into action in running railway cars renders it absolutely essential that every precaution should be taken against accident by collision, not only with other trains, but with animals. A collision with animals may be attended with more serious injury than their destruction; it may derail the cars and cause the death or serious injury of passengers. Where these companies have the right to fence in their tracks, and thus secure their roads from cattle going upon them, it would seem to be a wise precaution on their part to put up such guards against accidents at places where cattle are allowed to roam at large. The statute of Iowa, in fixing an absolute liability upon them for injuries to cattle committed in the operation of their roads by reason of the want of such guards, would seem to treat this precaution as a duty. It is true that, by the common law, the owner of land was not compelled to inclose it, so as to prevent the cattle of others from coming upon it, and it may be that, in the absence of legislation on the subject, a railway corporation is not required to fence its railway, the common law as to inclosing one's land

Legislature
may impose
double dam-
ages for fail-
ure to fence.

having been established long before railways were known. But the obligation of the defendant railway company to use reasonable means to keep its track clear, so as to insure safety in the movement of its trains, is plainly implied by the statute of Iowa, which also indicates that the putting up of fences would be such reasonable means of safety. If, therefore, the company omits those means, the omission may well be regarded as evidence of such culpable negligence as to justify punitive damages where injury is committed; and if punitive damages in such cases may be given, the legislature may prescribe the extent to which juries may go in awarding them.

The law of Iowa under consideration is less open to objection than that of Missouri, which was sustained in the case cited above. There double damages could be claimed by the owner whenever his cattle had strayed upon the track of the railway company for want of fences on its sides, and had been killed or injured by the railway trains. Here such damages can be claimed for like injuries to cattle only where the company has received notice and affidavit of the injury committed 30 days before the commencement of the action, and has persisted in refusing to pay for the value of the property destroyed or the damage caused. There must be not merely negligence of the company in not providing guards against accidents of the kind, but also its refusal to respond for the actual damage suffered. Without the additional amount allowed there would be few instances of prosecutions of railroad companies where the value of the animals killed or injured by them is small, as in this case; the cost of the proceeding would only augment the loss of the injured party. As said in the Missouri case cited: "The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress, if the private interest were not supported by the imposition of punitive damages."

The legislation in question has been sustained in numerous instances by the supreme court of Iowa. In *Welsh v. Chicago, B. & Q. R. Co.*, 53 Iowa, 632, which was an action to recover double the value of a horse alleged to have been killed by one of the defendant's engines at a point where it had the right to fence the road, the court below instructed the jury that it was the duty of the company to fence its road against live stock running at large at all points where such right to fence existed; and it was objected to this instruction that no such duty existed, upon which the supreme court of the state, to which the case was taken, said: "While it is true the statute does not impose an abstract duty or obligation upon railroad companies to fence their roads, yet as to live stock running at large a failure to fence fixes an absolute liability for injuries occurring in the

operation of the road by reason of the want of such fence. The corporation owes a duty to the owners of live stock running at large either to fence its road, or to pay for injuries resulting from the neglect to fence." And in *Bennett v. Wabash, St. L. & P. R. Co.*, 61 Iowa, 355, 13 Am. & Eng. R. Cas. 649, the same court said: "We think the only proper construction of the statute is that, in order to escape liability, the company must not only fence, but keep the road sufficiently fenced; and this has been more than once ruled." As it is thus the duty of the railway company to keep its track free from animals, its neglect to do so, by adopting the most reasonable means for that purpose,—the fencing of its roadway, as indicated by the statute of Iowa,—justly subjects it, as already stated, to punitive damages, where injuries are committed by reason of such neglect. The imposition of punitive or exemplary damages in such cases cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law. It is only one mode of imposing a penalty for the violation of duty, and its propriety and legality have been recognized, as stated in *Day v. Woodworth*, 13 How. 363, 371, by repeated judicial decisions for more than a century. Its authorization by the law in question to the extent of doubling the value of the property destroyed, or of the damage caused, upon refusal of the railway company, for 30 days after notice of the injury committed, to pay the actual value of the property or actual damage, cannot, therefore, be justly assailed as infringing upon the fourteenth amendment of the constitution of the United States.

Judgment affirmed.

Constitutionality of Fence Laws.—See *Missouri Pac. R. Co. v. Humes* (U. S.), 22 Am. & Eng. R. Cas. 557, note 564; *Phillips v. Missouri Pac. R. Co.* (Mo.), 24 Ib. 368; note, 24 Ib. 380; 7 Am. & Eng. Encyc. of Law, 910, 938.

BIELENBERG

v.

MONTANA UNION R. CO.

(*Montana Supreme Court, February 2, 1889.*)

Stock-killing—Statute Imposing Absolute Liability—Constitutional Law.—The Montana statute which provides that every railroad company "which shall damage or kill any horse, . . . by running any engine or engines, car or cars, over or against any such animal, shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof," is unconstitutional and void by reason of the fact that it imposes an absolute liability upon such companies without negligence on their part.

Same—Construction of Act—Rule of Evidence.—The language employed in such statute does not warrant a construction which limits the effect of the statute to the establishing of rule of *prima facie* evidence of negligence, and the court cannot, for the purpose of sustaining the constitutionality of the act, adopt any such construction.

APPEAL from District Court, Silver Bow County.

Action by Charles P. H. Bielenberg against the Montana Union R. Co. to recover damages for killing a horse belonging to plaintiff. The defendant appeals from a verdict and judgment for plaintiff for \$250.

William H. De Witt for appellant.

Knowles & Forbis for respondent.

BACH, J.—This action is for damages for the alleged negligent killing of plaintiff's horse by defendant, upon its railroad. The defendant appeals from the order denying a new trial. One of the alleged errors relied upon by appellant is the following instruction, given by the court at the request of respondent: "Under the laws of this territory, the killing being proved, or being admitted, as in this case, the negligence of the defendant must be presumed, and the burden of proving the exercise of due care devolves upon the defendant; and unless the defendant shows that it exercised reasonable care and caution to avoid the killing, then you will find for the plaintiff." Section 713, p. 826, Comp. St., provides as follows: "Every railroad corporation or company operating any line of railroad or railway, or any branch thereof, within the limits of this territory, which shall damage or kill any horse . . . by running any engine or engines, car or cars, over or against any such animal, shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof." It is conceded by counsel for respondent that this section, literally construed, is unconstitutional; and we would not pass upon the question if we were not of the opinion that the instruction complained of is erroneous, unless it can be held good under the statute, thus stating a rule more favorable to the appellant than the law requires.

There is an apparent conflict of authorities upon this question; but upon a careful investigation of the cases the conflict disappears, and few authorities can be found sustaining a statute similar to that which we are now considering. The leading case upon the subject is *Thorpe v. Rutland, etc., R. Co.*, 27 Vt. 140, and this case has been followed in the case of *Rodemacher v. Milwaukee & St. P. R. Co.*, 41 Iowa, 302, which also cites *Ohio & Miss. R. Co. v. McClelland*, 25 Ill. 123. These cases will serve to show the distinction which we think is to be made between the case under consideration and the majority of those cases which

Constitution-
ality of stock-
killing laws—
Authorities
examined.

are usually cited as sustaining a doctrine contrary to the conclusion which we have reached upon this question. The statutes of Illinois and Vermont, which the courts of those states were considering, enacted that all railroads should erect and maintain sufficient fences along their tracks, and declared that all railroads failing to comply with that law should be liable for all damages accruing to the owners of live-stock killed or injured by such railroads. The supreme court of the United States, in a recent case, has decided that a law compelling railroads to fence their lands is not unconstitutional, holding that it is a police regulation. *Minneapolis & St. L. R. Co. v. Beckwith*, 9 Sup. Ct. Rep. 207. This doctrine had already been announced by many state courts. Bearing this in mind, we find that the Vermont and Illinois cases establish the rule that where a railroad company conducts its business in violation of the law, it shall be liable for all damages to stock, which damage is the result of such violation. Such statutes, therefore, merely affix a penalty to the violation of a duty imposed by a valid law of the land. That this distinction is recognized by the courts of Illinois is apparent from a later case in the supreme court of that state (*Ohio & Miss. R. Co. v. Lackey*), hereafter referred to in this opinion. There is no law in this territory which compels railroads to fence their lands, and in order to hold the literal provisions of this section constitutional, we must lay down the doctrine that the legislature can inflict a penalty upon one who is doing a lawful act in a lawful manner. We think such a construction violates the principles of the constitution. After a careful consideration of all the cases, we firmly believe that the case from the Iowa supreme court is the only case which sustains a statute similar to ours. It would be almost impossible to add aught to what has been said upon this subject by other courts, and we content ourselves with stating the conclusion already announced; citing as authorities the following cases: *Railroad Co. v. Parks*, 32 Ark. 131; *Zeigler v. South & North Ala. R. Co.*, 58 Ala. 595; *Ohio & Miss. R. Co. v. Lackey*, 78 Ill. 55.

In Illinois the statute required railroads to defray the expenses of burial of all persons dying on or killed by their trains. In the case last cited, the court say: "On what principle is it that railroad corporations, without any fault on their part, shall be compelled to pay charges which, in other cases, are borne by the property of the deceased, or, in default thereof, by the county in which the accident occurred? An examination of the section will show that no default or negligence of any kind need be established against the railroad company, but they are mulcted in bearing charges if, notwithstanding all their care and caution, a death should occur in one of their cars, no matter how caused, even if by the party's own hand. Running of trains by these corpora-

tions is lawful, and of a great public benefit. It is not claimed that the liability attaches for a violation of any law, the omission of any duty, or the want of proper care and skill in running their trains. . . . The penalty is not aimed at anything of this kind. We say penalty, for it is in the nature of a penalty, and there is a constitutional prohibition against imposing penalties where no law has been violated or duty neglected."

As we have already stated, counsel for appellant concedes that the statute, when literally construed, is unconstitutional, because it lays down a rule of conclusive evidence; but he claims that the statute should be construed so that it may establish a rule of *prima facie* evidence of negligence; that is to say, when it appears in evidence that one of the animals mentioned in the statute has been killed by a railroad, a *prima facie* case of negligence shall be deemed to have been established. Counsel cites as authority section 178 of Endlich on the Interpretation of Statutes. We apprehend the rule to be as follows: Courts will not set aside a declaration of the legislative will, unless it is plainly in violation of a constitutional provision; that where a statute upon its face is capable of two interpretations, one void, as being contrary to the constitution, the other valid, the courts will adopt the latter; but (citing from the learned author, Mr. Endlich, § 180) "the rule stated does not warrant the avoidance of unconstitutionality in a statute by forcing upon its language under construction a meaning which, upon a fair test, is repugnant to its terms. Where the language will not fairly bear a construction consistent with the constitution, the courts can only refuse to enforce the act." The statute under consideration was evidently enacted to create a conclusive presumption. It is not susceptible of two interpretations. If the court could force upon it such a meaning as is sought to be established, we could with equal propriety declare it to be but a statement of the common law that a railroad should be liable for damages to stock resulting from the negligence of such railroad, and such an interpretation would have a two-fold authority,—one that, thus construed, it is a declaration of the common law, and not in conflict with it, which is a general rule of interpretation: the other that, when thus construed, it violates no principle of common justice; for to say that the owner of live-stock may permit them to go upon the lands purchased by a railroad company, and may recover damages for any injury inflicted upon them by such company, irrespective of actual negligence upon its part, seems to present a case of great injustice, and this violates the rule of statutory construction contained in section 638, p. 226, Comp. St. Counsel for respondent has cited upon this point a case from 53 Ala. 595 (Railroad Co. v. Williams). In a later case

Statute imposes absolute liability, and does not create rule of evidence.

from the same state the court refused to give such a construction to the statute, and held that a rule of positive and conclusive proof was contained in the statute, which was therefore unconstitutional. See *Zeigler v. South & North Ala. R. Co.*, 58 Ala. 694. We are of the opinion that the instruction cannot be sustained, either as a statutory rule of law or as a correct interpretation of the general law upon the subject of negligence.

There are cases cited upon the brief of respondent which declare the rule to be as stated in the instruction under review. But the great weight of authority is against such a proposition, and we consider it to be contrary to the true principle governing the case. The gist of the action is negligence, and until some negligence is shown there cannot be said to be any liability. Much has been said in argument in this case for and against this rule, as applied to railroads. It is not for us to declare what the law should or should not be, or to declare that what is law for one is not law for all. The legislature is now in session, and may adopt such law as to it seems wise. This decision does not conflict with the rule established in *Diamond v. Northern Pac. R. Co.*, 6 Mont. 580, 29 Am. & Eng. R. Cas. 117. That case was decided upon a statute expressly declaring that railroad companies shall keep their right of way free from dead grass, and that a failure so to do shall be *prima facie* evidence of negligence. Section 719, p. 830, Comp. St. And in the opinion in that case the learned judge further fortified the decision upon the ground that there are accidents arising from certain causes, the very existence of which show a *prima facie* case of negligence, the cause of the accident in that case being sparks from a locomotive. Mr. Bailey, in his work upon the Conflict of Judicial Decisions, has collected the cases upon either side of this question, and a reference to page 250 of his work will show an extensive line of authorities sustaining the rule as stated in the *Diamond Case*.

The order appealed from is reversed, with costs, and the cause remanded to the court below for a new trial.

MCCONNELL, C. J., and LIDDELL, J., concur.

Stock-killing—Constitutionality of Statute Imposing Absolute Liability.—In *Jensen v. Union Pacific R. Co.*, Utah Sup. Ct., June 7, 1889, it was held that the Utah statute of March 3, 1884, which enacts "that any corporation operating a railway or railroad within this territory which shall injure or kill any live-stock by running any engine . . . over or against any such live-stock, shall be liable to the owner or owners of such live-stock for the damage sustained . . . by reason of such injuring or killing," was a taking of property without due process of law within the meaning of the fourteenth amendment to the federal constitution, and hence is unconstitutional and void. The court said:

"Counsel for the appellant urges upon this court that the statute quoted is in conflict with that part of the fourteenth amendment to the

federal constitution which reads as follows: 'Nor shall any state deprive any person of life, liberty, or property without due process of law.' The origin and history of this quotation is not in dispute in American jurisprudence. It is taken from the Great Charter, and in exact language is as follows: 'That no man shall be taken or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land.' For more than 600 years this law has been the sheet-anchor of the liberty of the English-speaking people. Now, what is the meaning of the phrase, 'judgment of his peers or the law of the land'? When this charter was signed by the king of England it must be borne in mind that there was then existing the constitutional common law of that country, which prescribed regular and consistent forms and methods of judicial procedure for the administration of distributive justice, and it is in the light of this common law that the quotation is to be interpreted. Lord Coke at an early day gave to the phrase 'law of the land' an interpretation which has never been departed from, but adopted by all subsequent judges and writers. He said it meant 'due process of law.' This definition, as has been seen, is adopted into our constitution. But it yet remains for us to define 'due process of law,' as understood in the common law of England, and by inheritance the common law of America. Many definitions have been attempted, but it is believed that they all come to this citation, which means that a party shall have his day in court,—trial; which means the right of each party, plaintiff and defendant, to introduce evidence to establish his right to recover on the one hand, and to establish his defence upon the part of the other; after which comes judgment. Any judgment which is rendered without these modes of procedure, or in disregard of them, is not 'due process of law.' Any other procedure condemns before it hears, does not proceed upon inquiry, but renders judgment before trial.

Tested by the light of these suggestions, how stands it with the statute in this case? The defendant company, under a charter granted by the legislature, of which the statute mentioned is no part, has purchased its right of way over the lands of the territory, established its track, and put thereon its engines and cars, for the purpose of carrying out the original design of the legislature in granting its charter. It will then be seen that the defendant is in the exercise of a lawful right, in a lawful way. Now comes the statute and says to the defendant: 'Notwithstanding all this, when you kill an animal you shall pay its value to the owner.' That is, although you are in the exercise of a perfectly lawful pursuit, and without any fault or negligence, proof of killing and value shall be conclusive evidence of wrong upon your part, and you shall not be allowed to aver or prove the contrary. If this be due process of law, then all the legislature has to do, to take the property of A and give it to B, is to enact that when A sues B certain admitted facts shall establish conclusively A's right to recover, and B. shall not be heard to introduce evidence to the contrary. No matter how careful and cautious an engineer may be in the management of his train; no matter how steep the grade may be that his train is going down; no matter how many hundred lives are in his care behind his engine,—yet all must be sacrificed to save a horse or cow, or the company is to pay the damages. Hardly.

"But it is said that the legislature has the right to regulate the railroads in the exercise of their franchises; and cases are cited where it has been held that they may be required to fence their roads, and, upon failure, to pay for all stock killed by them. That the legislature may require a railroad to fence its track, and that this is a proper exercise of the police power, has never been doubted, that we are aware of. And where they

fail to observe such police regulations it ought not to be doubted that the legislature has the power to impose penalties for such failure. The same may be said of storing powder, dynamite, and other dangerous explosives, and operating dangerous machinery. But it is said that the legislature has the right to impose additional burdens upon railroads, from time to time, and cases are cited which uphold statutes making railroad companies absolutely liable for all damages done by the escape of fire from their engines. In the first place, it may be said that there is quite a difference between such statutes, and the one in this case; and, speaking for himself, the writer is not able to give his assent to the validity of such legislation upon any ground yet suggested. But, however all this may be, we are all of the opinion that the legislation in this case contested cannot be sustained. To do so is to take from the defendant company the right of way over its track, and confer it upon the cattle and horses of the country.

Ample authority can be found for the position taken in this opinion. The case of *Zeigler v. South & North Ala. R. Co.*, 58 Ala. 594, is exactly in point. The cases of *Bielenberg v. Montana Union R. Co.* (Mont.), 20 Pac. Rep. 314, and *Cottrel v. Union Pac. R. Co.*, 21 Pac. Rep. 416, decided by the supreme court of Idaho, are cases where statutes, exact copies of the one under consideration, were held void as not being due process of law. The case of *East Kingston v. Towle*, 48 N. H. 57, was where a statute undertook to make the owner of a dog liable for all damages his dog might do to sheep in the township, such damage to be fixed by the selectmen of the county. The supreme court held this act void, as not 'due process of law,' because it did not give the owner of the dog any right to contest the amount of the damage. See, also, *Cooley*, Const. Lim. (5th Ed.) pp. 430, 436, and notes. We therefore conclude that the statute in question is in conflict with the quotation from the fourteenth amendment, and void. The result is that the action of the court below, in not rendering judgment for the defendant upon the special finding, was erroneous, and must be reversed."

Fences—Stock-killing—Appraisement of Damages—Right to Jury Trial.—

In *Dacres v. Oregon R. & Nav. Co.*, Wash. Terr. Sup. Ct., Jan. 29, 1889, it was held that sections 2-7 of the Wash. Terr. "Railway Fence Law" of 1883, which provided that when stock was killed on a railway, the value should be ascertained by appraisers in a prescribed manner and the appraised value should thereupon become due and payable, were unconstitutional as denying the right of trial by jury. It was also held that sections 1 and 8 of the act, which subject railroad companies to liability for all stock killed on the track unless it is fenced, were constitutional and were not so connected with the rest of the statute as to be affected by the invalidity thereof. The court said:

"It is conceded in the brief filed by appellant's counsel in this cause, and also by counsel in argument before this court, that sections 2, 3, 4, 5, 6, and 7 of this act are unconstitutional because they deny the right of trial by jury; and of this there can be no question. The territorial legislature has no power to deprive any person or corporation of the right of trial by jury in a common-law action, where the amount involved exceeds \$20. 7th Amend. Const. U. S.; *Parsons v. Bedford*, 3 Pet. 433; *Thomas v. Hilton*, 3 Wash. T. 365. Nevertheless this is clearly what the legislature attempted to do by the system of procedure provided in sections 2, 3, 4, 5, 6, and 7 of this act. The question then arises: Is the whole act void by reason of the unconstitutionality of the sections named? Questions of this character have been much discussed by the courts of this country, and the proper rule of statutory construction in such cases seems now to be well settled. This rule is nowhere more clearly or more concisely expressed than in Judge Cooley's work on Constitutional Limita-

tions, in which it is laid down as follows: 'Where, therefore, a part of a statute is unconstitutional, that fact does not authorize courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. . . . If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.' *Cooley, Const. Lim.* (5th Ed.) 212.

Turning, now, to an examination of the statute under discussion, it is plain to be seen that the general object which the legislature had in view in its passage was to enlarge and extend the rights of owners of live-stock as against railway companies, in cases where such stock should be killed or maimed by passing railway trains. The means employed by the legislature in this act, to attain this object, were two fold: First, by making railway companies liable for the killing or maiming of live-stock so long as the railways are not properly fenced; second, by providing a cheap, simple, and prompt remedy for the enforcement of the rights thus conferred. It is conceded upon all hands, as we have seen, that this second provision is unconstitutional, and, under the rule of construction above mentioned, if these two provisions are so connected in subject-matter or in meaning that it cannot be presumed that the legislature would have passed the one without the other, then both provisions must fall together. This is not, however, our view of the statute. It seems to us that these two provisions are easily separable; that they are not depending upon each other, and are not so intimately connected that one may not exist without the other. Under any fair reading of this statute it must appear that after striking out the unconstitutional portions, that is, sections 2, 3, 4, 5, 6, and 7, 'that which remains is complete in itself, and is capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected.' Counsel for appellee strongly urged in argument that the two parts of this statute are so 'mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently.' But we see no good reason to suppose that if the unconstitutionality of the sections relating to the proposed remedy had been known to the legislature, they would therefore refuse to pass the section conferring enlarged rights upon the persons for whose benefit the other portions of the statute were framed. On the contrary, there is the more reason to believe that the legislature, finding themselves unable to extend the relief intended by the void sections, would be the more inclined to enact the law embodied in sections 1 and 8. These two sections make a sensible and reasonable law; a law essentially the same as that which may now be found upon the statute books of many of the states of the Union. And it may not be out of place here to observe that legislation of this kind has been commended in the strongest terms by some of the highest courts in this country. *Corwin v. New York & E. R. Co.*, 13 N. Y. 42; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 22 Am. & Eng. R. Cas. 557. Of course it goes without saying that courts have nothing to do with the policy or impolicy of a law; that belongs to the province of another department. But where, as in the case at bar, it becomes important to inquire whether the legislature would have passed one part of a statute without the other, then it is proper, as a means of arriving at the legislative intent, to consider the law in all its bearings.

"It was contended upon the argument that the construction of section 1, standing alone, would be necessarily different from that which would be given to it in its proper connection with the other sections of the act, taken as a whole; that, for instance, reading section 1 out of its present connection, it would seem as if it provided that if an animal was injured, however slightly, by a passing train, the company would be liable, not for the amount of damage done to the animal, but for its full value; whereas, if the section is to be read in connection with the other sections of the act, it becomes apparent at once that the legislature never intended any such construction. A careful reading of this statute will readily show that this argument is not well founded; and that, whether standing with section 8, or in connection with the following sections in the same act, section 1 is fairly open to but one construction, and that is this: Where an animal, being lawfully upon adjoining land, thence escapes upon a railway track at a place which is not fenced, but which the company may properly and lawfully fence, and the animal is killed by a passing train, the company is liable for the value of the animal, if killed; and, if injured, but not killed, for the amount of damages caused by the injury."

SATHER

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

(*Minnesota Supreme Court, January 29, 1889.*)

Wagon-crossings—Statutory Obligation to Construct Cattle-guards at—Private Ways.—The term "wagon-crossings," as used in section 54, c. 34, Minn. Gen. St. 1878, requiring railroad companies to build and maintain "cattle-guards," refers to wagon roads used for public travel crossing railroads, and not to private ways or farm-crossings.

Farm-crossings—Statute Authorizing Company to Furnish Locks for Gates—Negligence.—The provision in section 4, c. 98, Minn. Gen. Laws 1877, that railroad companies may furnish land-owners with locks for gates at farm-crossings, is permissive and not mandatory; and in case no such locks are furnished, the question of the negligence of the corporation in any particular case, as respects the opening or closing of such gates, or their being securely fastened, is open for investigation, and is not affected by the statutory provision referred to.

Stock-killing—Open Gate—Evidence of Negligence.—The evidence tended to show that plaintiff's colt escaped into the field of an adjoining proprietor, in which was a gate leading to a farm-crossing over defendant's road; and that it escaped through the gate upon the railroad track and was killed. The gate, which opened inwards towards the field, was found wide open on the morning after the accident. One of defendant's sectionmen testified that he had closed the gate on the previous evening. *Held*, that, as there was no evidence to show negligence on the part of the

defendant either in regard to the fastening of the gate, or that it was pushed open by an animal, the plaintiff could not recover.

APPEAL from District Court, Carver County.

Action by Preston J. Sather against the Chicago, Milwaukee & St. Paul R. Co., to recover damages for killing his colt. Defendant appeals from a judgment for the plaintiff.

W. H. Norris for appellant.

Peck & Brown for respondent.

VANDEBURGH, J.—1. The statute (Laws 1876, c. 24, amended by Laws 1877, c. 73,—Gen. St. 1878, c. 34, §§ 54, 57) requires all railroads “to build and maintain good and sufficient cattle-guards at all wagon-crossings, and good and substantial fences on each side of such road.” And a failure to build and maintain cattle-guards and fences as above provided is to be deemed an act of negligence. The term “wagon-crossing,” used in the statute, refers to crossings for public travel on roads, highways, or streets. *Greeley v. St. Paul, M. & M. R. Co.*, 33 Minn. 137, 19 Am. & Eng. R. Cas. 559. It means established wagon roads intersecting railroads. The statute does not name or include “private ways” or “farm-crossings,” so called. The former are to remain open, and are protected by cattle-guards and wing fences, which the adjacent farms or lands are required to be separated from the right of way by fences on each side of such road; and if farm-crossings are reserved or secured by adjacent land-owners for private convenience, the gates and bars for the openings are understood to be a part of the fence, and hence sufficient to protect stock, and keep it from going upon the track, except when taken across the same by or under the authority and direction of the owner; and the provisions of the statute as made do not reach such cases. *Brooks v. New York & E. R. Co.*, 13 Barb. 597; *Cook v. Milwaukee & St. Paul R. Co.*, 36 Wis. 49. In other words, the statute requires railroad companies to fence along their right of way where it can do so; but as it cannot fence across highways, the protection there required in order to keep cattle off the track is the maintenance of cattle-guards, and, in the absence of special or other statutory provisions than is provided in the chapter referred to, we think the road is fenced, as respects the farm-crossings, where safe and proper gates are erected and maintained.

2. Chapter 98, Gen. Laws 1877, is entitled “An act relating to fences and gates along railroad tracks, and for protecting the same.” Sections 1 and 2 make it unlawful for any person to break or injure any fence or gate along any railroad track, or to leave open any such gate so that cattle may stray thereon, or to permit

Company not
bound to build
cattle-guards
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crossing.

Statute au-
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missive only.

any animal to stray thereon. And section 3 provides penalties for such offences. Section 4 is as follows: "Whenever any gate shall be erected by any railroad at any farm-crossing, for the exclusive use of any owner of land, such company may provide a lock for the same, and deliver the key to such owner, or the tenant or the occupant of such land: and if such gate shall thereafter be opened, whereby cattle or other animals shall get upon such railroad track, and be injured or killed, unless maliciously or wantonly done by such railroad company or its employees, such company shall not be liable to the owner of such injured animals for such damage." This provision, in case it is complied with, necessarily eliminates from the issue, upon the trial of an action of this kind, all questions of negligence on the part of the defendant as respects any such gate being left open or unfastened. But if the company omit such precautions, the question of its negligence in that particular as well as others will remain open, and, in so far as it may be found to be the proximate cause of the injury complained of, its liability will remain unaffected by the statute in question.

3. The only remaining question in the case, then, is whether the plaintiff's loss in this instance is attributable to the negligence of the defendant. The theory of the plaintiff is, and the evidence tends to support it, that the colt in question escaped from the field of an adjoining proprietor into the field of one Wanke, from which through a gate in the railroad fence (made to accommodate the latter for a farm-crossing) it escaped, in the night-time, upon the railroad track, and was killed. Besides the absence of cattle-guards and lock and key, the negligence complained of is "in not properly making and fastening the gate, and by the same being left open." Referring to the evidence, we find that there is no criticism of the gate except as to the want of lock or other secure fastening. The undisputed testimony is that the gate is "an ordinary railroad gate." "It is a board gate—swinging gate." "The gate slides right in between two posts." "This was the only method of closing and fastening." "There was nothing to prevent any animal from pushing the gate open, but the heft on the ground. The land descends towards the railroad." The gate was found open early in the morning, and the colt was found alongside the track, where it was killed by a train. There is no evidence, however, tending to show that the gate was open in consequence of a defective or insecure fastening, or that it was pushed open by animals. The gate opens (that is, swings) into the field, and not outwardly towards the track, and when found open in the morning "it was swung up the hill," and wide open, showing that it had been opened and left open by some person. The evidence also

Evidence held to be insufficient to show defendant's negligence.

shows that at 6 P.M. the night before "it was closed and well shut," by one of the sectionmen, who found it open at 7 next morning, when he resumed work. All the evidence there is explanatory of the manner in which the gate was opened is that of the owner of the field into which it opens, who swears that it was closed tight at 6 A.M.; "that he left it open, intending to return soon." The plaintiff's evidence tends to show that the colt was killed at an earlier hour. Whether either is mistaken as to the time the colt came through the gate, if in fact it escaped that way, or whether he was let through at an earlier hour, in either case there is no evidence that it was the result of the negligence of the company.

Judgment reversed.

Fences—Obligation of Company to Construct and Maintain.—Section 1 of the Nebraska act of 1867 requires every railroad company in the state, within six months after its line of railroad or any part thereof is open, to erect and thereafter maintain fences on the sides of said railway, or the part thereof open for use, suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the track, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, etc. The provisions of section 18, art. 2, ch. 2, Neb. Comp. St., defining a "lawful fence," apply alone to the inclosing of lands, and do not apply to the fencing of a railway. That matter is governed by section 1, art. 1, ch. 72, Comp. St. *Chicago, B. & Q. R. Co. v. James*, Neb. Sup. Ct., Mar. 20, 1889.

Same—Construction and Sufficiency of Cattle-guard at Grade-crossing.—The plaintiff, in an action to recover damages for injuries to his horses, which had become frightened and escaped upon defendant's track at a grade-crossing because of the alleged negligence of the defendant in maintaining a cattle-guard, cannot complain of an instruction that the object of Vt. Rev. Laws, § 3407, requiring railroad companies to construct and maintain cattle-guards, is twofold, viz., to secure the safety of passengers and to prevent injury to animals. The Vermont statute does not require that a guard must be so built that under no circumstances could an animal cross it, but only that, under all ordinary circumstances, it should be sufficient to prevent cattle and other animals from getting upon the track. *Wait v. Bennington & R. R. Co.*, Vt. Sup. Ct., Feb. 6, 1889.

Same—Duty to Keep Cattle-guards Clear of Snow and Ice.—When the court has instructed the jury that, under a statute requiring railroad companies to construct and maintain cattle-guards at grade-crossings, a company must keep its cattle-guards sufficient in winter as well as summer, and that it must clear the cattle-guards of snow and ice with reasonable diligence, it is not error to charge the jury that "the legislature probably never intended to require of a railroad the duty to keep cattle-guards clear of snow and ice when doing so would practically impose a burden upon the road that was incommensurate with its duty both to the public and to its own passengers." *Wait v. Bennington & R. R. Co.*, Vt. Sup. Ct., Feb. 6, 1889.

Same—Effect and Operation of Statute.—By the Pennsylvania act of March 28, 1868 (P. L. 514), which applies only to Warren county, it is provided that "All railroad companies, when railroads are completed, and on which they are running trains in said county, shall before the first day

of September, 1868, construct and keep in repair, or cause to be constructed and kept in repair, a good and sufficient fence." This act, by a supplement of April 17, 1869 (P. L. 1125), was extended to other counties, including McLean county. *Held*, that the fact that a railroad in McLean county had been completed and operated before September 1, 1868, did not except the company owning it from the statutory duty to fence imposed by the statute. *Shurley v. New York, L. E. & W. R. Co.*, Pa. Sup. Ct., Oct. 1, 1888.

Cox

v.

MINNEAPOLIS, SAULT STE.-MARIE AND ATLANTIC R. CO.

(*Minnesota Supreme Court, June 24, 1889.*)

Fences—Statutory Obligation to Fence—Excepted Places—Burden of Proof.—Where domestic animals are killed or injured on a railway track not protected by fences or cattle-guards, the burden rests upon the railway company to show that it is not bound to fence at that place, on the ground that it is necessary to be kept open for the accommodation of the public.

Same—Places Necessary for Use for Public Purpose—Actual Use.—The implied exemption is not to be extended to cases where the reason for it is wanting; and where the particular land in controversy is not actually used for such public purposes, it is not enough that the plans of the company contemplate such use at some indefinite time in the future.

Same—Stock-killing—Condition of Place Where Stock Enter Track.—In case of accident resulting from the presence of such animals upon a railway track, it is the condition of the road where they enter upon it, and not where they are killed, that must govern.

Same—Contributory Negligence—Escaping Animals.—The owner of such animals is not chargeable with contributory negligence, where they escape and get upon an unfenced railway track without his fault.

APPEAL from District Court, Hennepin County.

Action by John Cox against the Minneapolis, Sault Ste.-Marie & Atlantic R. Co., to recover damages for killing a horse belonging to plaintiff. Defendant appeals from a judgment for the plaintiff.

J. D. Springer, H. S. Abbott, and F. D. Larrabee for appellant.
C. F. Baxter for respondent.

VANDEBURGH, J.—The plaintiff's horse ran away and entered upon the unfenced right of way and track of defendant in the suburbs of the city of Minneapolis, and was killed. This action is brought to recover its value, with harness alleged also to have been destroyed by the colliding engine. The argument of the defendant proceeds upon the as-

Facts.

sumption that the horse entered upon the track at a wagon-crossing, open and used for travel, distant 65 feet north from the "headblock" and last switch in that direction, connecting a side track leading to a round-house with the main track, which runs to and connects with a system of tracks upon terminal grounds occupied by defendant's shops, etc., both the round-house and shops being several hundred feet distant from the switch. As there is evidence tending to show that the horse turned up the main track on that crossing, and the jury may have so found, some of the legal propositions submitted must be considered in reference to such a state of facts.

1. It was the duty of the defendant to protect its track by a fence or by cattle-guards at that point, unless the situation was such as to bring the case within the implied exception to the statutory provisions requiring such precautions. That is to say, if it was necessary that the grounds of the company there, including this crossing, should have been kept open in order to enable the company properly to discharge its duties to the public, and accommodate the public convenience or necessity, then, within the settled rule of this court, the defendants would not be liable for a failure to fence. *Greeley v. St. Paul, M. & M. R. Co.*, 33 Minn. 138, 19 Am. & Eng. R. Cas. 559; *Hooper v. Chicago, St. P., M. & O. R. Co.*, 37 Minn. 53; and other cases. But the construction under which this exception is implied in the practical application of the statutory rule is not to be extended to cases where the reason for it is wanting, or beyond the reasonable limits of the company's depot or other public grounds which necessarily fall within the exemption.

2. In this case it appears that the defendant's line of road, running north from the switch, traverses an open area, with no intersecting highway or travelled crossing for a long distance, except at the place named, and is not fenced. The horse was overtaken upon a bridge a considerable distance above this crossing, so that, whether the jury found that it entered upon the track at that place or at any point between it and the bridge, the company would be presumptively subject to the statutory rule; and it is the condition of the road where the horse entered the right of way of the defendant, and not the place where he was killed, that is to govern, and that becomes material to consider upon the question of the company's liability. From the switch north the road has but a single track, and the burden rested upon the defendant to prove the existence of the facts to bring the case within the exception, and to show that it was not bound to fence or maintain cattle-guards at the place in question. But the evidence fails to show that the track at or above

Company not bound to fence public place.

Same—Duty of company to fence place of accident.

the crossing is within its yard as at present occupied, used, or required for the business of the company. An engineer of the defendant testified that a map introduced in evidence accurately represented the grounds, buildings, and line of the road as above described; that the company owned 160 acres there; that above the switch there was nothing but the main line now, and below were the car-shops, etc.; and he was thereupon asked, "Have the company at present adopted plans for the future development of these yards as the business develops?" which was ruled out by the court. The company had acquired a large tract, which in its judgment would at some future time be needed by it for its yards, terminal grounds, and side tracks; but there is no suggestion that its yard and facilities for transacting its business at that place are not all that are required for the present and a reasonable time to come. It is not enough that the plans of the company contemplate at some indefinite time in the future the use of all these grounds for additional structures and increased business. The statute is to be given a practical and reasonable construction, and its operation as a police regulation is not to remain in abeyance to suit the private interests of the company or the future development of its plans or growth of its business. *Kobe v. Northern Pac. R. Co.*, 36 Minn. 518.

3. The case does not disclose any negligence on the part of the plaintiff in suffering his horse to be at large. It appears that he escaped from custody, and ran away, and was killed in harness, but it does not appear that it was through plaintiff's fault or carelessness. It was for the defendant to establish plaintiff's contributory negligence, and it is not shown in this case. Order affirmed.

Contributory
negligence.

Fences—Depot Grounds—Exception from Statutory Obligation.—The exception, by implication, to the statute imposing upon railway companies the duty of fencing their tracks, by which such places as are necessary and convenient for the use of the public may be left open, cannot be extended to a siding used merely for the loading of ties, wood, and piling purchased by the company (there being no testimony tending to show the amount of such business), and for the passing of trains, at a point where no depot is maintained, no employee stationed, and where persons desiring to take passage are obliged to flag the trains themselves. *Hurt v. St. Paul, M. & M. R. Co.*, Minn. Sup. Ct., Dec. 6, 1888. *Collins J.*, said: "While this statute is imperative, and excludes no part of the line in terms, it is held to be subject to an implied exception as to places, such as depot and station grounds, used for the convenience of passengers and the necessary handling of freight, which may be kept open and unfenced. The convenience, the necessities, of the public is the test; and this convenience and necessity is the limit of the exception to the statutory rule imposing upon railroads the duty of fencing upon each side of their tracks. *Greeley v. St. Paul, M. & M. R. Co.*, 33 Minn. 136, 19 Am. & Eng. R. Cas. 559; *Kobe v. Northern Pac. R. Co.*, 36 Minn. 518. In neither of these cases was there any attempt to define what may or should constitute depot or station grounds, except in a general manner; while in *Hooper v. Chicago*,

St. P., M. & O. R. Co., 37 Minn. 52, the court held that ground customarily and necessarily used by a railway company for the storage of wood hauled there for shipment, and upon which was an elevator used for the storage and shipment of grain (the evidence satisfactorily showing that the nature and extent of the business transacted upon the ground required that it should remain unfenced), must be held to come within the exception. In *Fowler v. Farmers' Loan & Trust Co.*, 21 Wis. 78, it was stated 'that depot or station grounds are a place where passengers get on and off the cars, and where goods are loaded and unloaded, and all grounds necessary or convenient and actually used for these purposes.'

Same—What are Depot Grounds—Way Station.—In an action for damages for killing a span of horses which escaped upon the track through the alleged failure of the company to fence its track, it was contended on the part of the company that the horses got upon the line of its road very near where there was a flag station, and where its trains stopped to take on passengers when flagged, or to let them off when desired. The evidence showed that there had at one time been a station-house at that point, and an agent of the company had been kept there, but for several years before the time in question the company kept no agent there; the station building had been closed up, and had gone to decay; that no freight was shipped or delivered at that place in the ordinary way; if freight was taken on the trains at that place, it was not billed until it arrived at the first station beyond; that there was a side track there, where trains sometimes passed each other, and where the company received charcoal and transported it. The evidence also showed that there were no grounds for a depot at that place outside of the usual right of way, and that the company had put in cattle-guards south of the station building about 350 feet, and north of the building about 721 feet, and beyond these points north and south the road was fenced. The evidence also showed that at the time in question the cattle-guard south had been permitted to go to decay. *Held*, that assuming that the grounds were "depot grounds," the extent of the "depot grounds" was properly submitted to the jury. *McDonough v. Milwaukee & N. R. Co.*, Wis. Sup. Ct., Dec. 22, 1888.

PITTSBURG, CINCINNATI AND ST. LOUIS R. CO.

v.

BOSWORTH.

(*Ohio Supreme Court, November 13, 1888.*)

Fences—Contract by Grantor to Construct and Maintain—Subsequent Purchaser.—A written agreement by the grantor of the right of way to a railroad company, to fence it on each side through his lands, will not affect the right of a subsequent purchaser to require the company to fence its road, under the provisions of sections 3324 and 3325, Ohio Rev. St., where the purchase was made without actual or constructive notice of the existence of such agreement.

Same—Use of Track—Constructive Notice.—Such agreement not being recorded, the mere use and occupation of the right of way by the company

and its successors for the purpose of a railroad will not constitute constructive notice of the existence of such agreement.

ERROR to Circuit Court, Clinton County.

In the original action the plaintiff sought to recover of the defendant \$570 as the reasonable cost of building a fence on each side of its right of way through his lands, under the provisions of section 3324 and 3325 of the Revised Statutes, imposing the duty on railroad companies of fencing their roads, and giving the abutting owner the right to build the fences, and to recover the reasonable costs of the company, when it fails to do so. Case stated. The defendant answered, relying on an agreement by which one A. W. Miller, who in 1852 granted the right of way to its predecessor, bound himself to keep up and maintain the fences on the line through his lands, and from whom the plaintiff by intermediate conveyances derives his title. A demurrer to this having been overruled, the plaintiff replied, denying the existence of the agreement, or any knowledge of it at the time he purchased. The case was submitted to the court on an agreed statement of the facts, which is as follows: "The parties to this action agree that the following statement contains and shall constitute the facts therein: (1) That the facts stated in the petition are true. (2) That the plaintiff derived his title to the lands described in the petition through, by, and under Andrew Miller. (3) That on the 17th day of June, A.D. 1852, the said Andrew Miller was the owner of said lands, and on that day executed and delivered to the Cincinnati, Wilmington & Zanesville R. Co. a certain paper writing, in the words and figures as set forth in a copy thereof hereto attached, marked 'Exhibit A,' and made a part of this agreed state of facts, and under and by virtue of which said company entered upon said lands, and built its road through the same. (4) That the railroad stock specified in said paper writing was delivered to said Andrew Miller, and said crossing and cattle-guards built, as in said paper writing required. (5) That said paper writing was, on the 31st day of January, A.D. 1884, recorded in the office of the recorder of Clinton county, Ohio, and after the commencement of this action, and at no other time. (6) That the plaintiff had no actual notice of the existence or contents of said paper writing; his only notice being the use and occupation of the roadway through said lands by the defendants and the several companies through and under which it claims, as stated in its answer. (7) That the defendant occupies and possesses said railroad by virtue of a lease thereof from the Cincinnati & Muskingum Valley R. Co. for the term of ninety-nine years, not yet expired. That said Cincinnati & Muskingum Valley R. acquired the title to said railroad and all

interests and property connected therewith, including rights of way by means of certain mortgages and judicial sales thereof, thereunder, and at and from the said Cincinnati, Wilmington & Zanesville R. Co., as fully as such proceedings could transfer them, and the said Cincinnati, Wilmington & Zanesville R. Co. has long since ceased to exist as a corporation. The above agreed statement of facts is submitted to the court as containing all of the facts on the case to be entered of record as such, and upon which the court is asked to pronounce the law alone."

" EXHIBIT A.

"*State of Ohio, Clinton County.* In consideration of one dollar, to me paid by the Cincinnati, Wilmington & Zanesville R. Co., I do hereby grant and release to said company the right to enter upon any lands I own, which lie on the line of said company's road, surveyed and adopted by them (or intended to be surveyed or adopted by them), and the right to run in curves and amend the line on the final construction of such railroad over said land, and to hold and use a strip thereof, to be selected by the engineers, not exceeding 100 feet in width, for the purpose of a railroad, so long as may be necessary, and to use the material standing or lying on said strip for the construction and repair of said road. I also agree to build and sustain all fences on each side of said roadway, and to pay all taxes on said land during the occupancy by said company of the same. And also the right of crossing other parts of my land to get at said railroad in construction and repair of said road. I will require said company to construct a farm crossing at the nearest surface grade, or within two feet thereof, where I select; also a cattle-guard on either side. And I hereby demand for said privilege four hundred and fifty dollars, to be paid in stock of said company.

"Witness my hand and seal the seventeenth day of June, A.D. 1852. A. W. MILLER. [Seal.]

"In presence of LAWRENCE FITZHUGH.

"Received January 31, 1884. Recorded February 1, 1884.

"E. B. HOWLAND, Recorder."

The common pleas rendered judgment for the defendant below. This was reversed on a proceeding in error by the circuit court, and judgment rendered for the plaintiff for the amount of his claim, and this proceeding is now prosecuted to reverse the circuit court, and affirm the common pleas.

John S. Brasee for plaintiff in error.

J. B. Foraker for defendant in error.

MINSHALL, J.—A number of questions presented in argument, as arising upon the record, need not, from the view we take of the case, be disposed of here.

1. Thus it is claimed that the rights conferred by the agreement between the original parties did not pass to the present owner of the railroad, because "successors" are not named, and that therefore the right of way itself, as well as the agreement as to fencing, was limited to the original company, and that the present owners can take nothing under that agreement. But, speaking for myself, I think this is not so. Being a grant to a corporation aggregate, it might last for ever, and so the word "successors" was not necessary to create a perpetuity of right, or a fee-simple. Words of perpetuity are only necessary to create such right when the grant is to a corporation sole. 2 Bl. Comm. 109; Ang. & A. Corp. § 172; Overseers *v.* Sears, 22 Pick. 122, Shaw, C.J. 126; 1 Mor. Priv. Corp. § 330.

Grant passes
through suc-
cessors not
named.

2. Again, it is contended that the obligation to build the fence was a personal one, binding upon the grantor only, and that it was not susceptible of being imposed upon the land so as to run with it, as against subsequent purchasers. But, speaking for myself, I am inclined to think, after a pretty full examination of the authorities, that there is nothing in the nature of the burden that would prevent its being made to run with the land of the grantor, as against subsequent owners, in favor of the right of way granted. That it would not have been so at common law may be conceded. It, with characteristic rigidity, proceeded upon a few inelastic principles. It did not admit of any new or unusual burdens being imposed upon land, and required, in all instances, that a privity of estate should subsist between the parties,—the owner of the land on which the burden was placed, and the owner of the land enjoying the benefit. But equity recognized and applied a different principle to such covenants. It took into consideration the convenience of the parties, and their intention in the matter, rather than the technical rules of the common law; and generally gave effect to the intention when the covenant concerned the land, and would promote the convenience of the parties in the use and enjoyment of it. Such covenants were not regarded as collateral, and were made to attend the land, and affects its ownership, as against purchasers with notice. *Whitney v. Union R. Co.*, 11 Gray (Mass.), 359, 364; *Trustees v. Lynch*, 70 N. Y. 440, 449; 1 Smith Lead. Cas. (6th Amer. Ed.) 167; Pom. Eq. Jur. §§ 689, 1295, 1342; Holmes Com. Law, 392 *et seq.* There are, however, cases and authorities which limit the doctrine to what are called "restrictive" covenants, and stop short of affirmative ones, like that in this

Covenant to
build fence
runn with
the land.

case. Pol. Cont. 227, 228. But they are not general. Many cases are to be found where affirmative covenants have been held to run with the land, on the ownership of which the burden of performing them is imposed. *Blain v. Taylor*, 19 Abb. Pr. 228; *Burbank v. Pillsbury*, 48 N. H. 475; *Bronson v. Coffin*, 108 Mass. 175; *Kellogg v. Robinson*, 6 Vt. 276; *Holmes v. Buckley*, 1 Eq. Cas. Abr. 27; *Allen v. Culver*, 3 Denio (N. Y.), 284-293; Pom. Eq. Jur. § 689, and note 5, § 1295; *Holmes, Com. Law*, 402. And in *Huston v. Cincinnati & Z. R. Co.*, 21 Ohio St. 236, an agreement of the railroad company to keep up the fences and crossings was held by this court to run with the land, so as to be binding as between the assignees or grantees of both the parties. And in the prior case of *Easter v. Little Miami R. Co.*, 14 Ohio St. 48, the agreement of the owner in his grant of the right of way to the company, to keep up the fences, was also held to run with the land. *Gholson, J.*, in delivering the opinion, said: "The construction and maintenance of a fence, on each side of the strip of land over which the right of way was to be exercised, manifestly affected the mode of enjoying it, and, it may properly be added, beneficially to both parties." In this case "assigns" were mentioned. But this is not material when it may be inferred from the circumstances that such was the intention. Thus, in *Masury v. Southworth*, 9 Ohio St. 340, it was held that a covenant by a lessee to insure ran with the land, and might be asserted by the assignee of the reversion against the assignee of the lessee, though not mentioned, where it appeared from the circumstances that such was the intention of the parties to the covenant. The addition of the agreement to sustain, to the agreement to build the fences, necessarily makes the obligation coextensive with the duration of the grant, and compels the inference that the parties intended to treat it as attending the land of the grantor, so long as the way granted should be used for the purpose of a railroad. "An owner may subject his lands to any servitude, and transmit them to others charged with the same; and one taking the title to lands, with notice of any equity attached thereto, or any outstanding right or claim affecting the title or the use and enjoyment of the lands, takes subject to such equities, and such right or claim, and stands in the place of his grantor, bound to do or forbear to do whatever he would have been bound to do or forbear to do." *Allen, J.*, in *Trustees v. Lynch*, 70 N. Y. 449. In equity, the precise form of the covenant or agreement is immaterial if the intention is reasonably clear. Thus, it is said: "It is not essential that it should run with the land, at law. A personal covenant or agreement will be valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the

party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform." *Whitney v. Union R. Co.*, 11 Gray (Mass.), 364, Bigelow, J. But it is not necessary to determine either of the questions.

The suit was brought to enforce a claim based upon the obligation of the company, created by statute (sections 3324, 3325, Rev. St.), to fence its track. It, by way of defence, relied upon a certain agreement as bringing it within the provisions of section 3329. The agreement obliges the owner of the land from which its predecessor acquired its right of way to keep up and maintain the fences along the track on each side, and the plaintiff derives his title from the same person. This agreement, whether susceptible of being admitted to record or not, was not recorded until after the suit was brought. And the agreed statement is "that the plaintiff had no actual notice of the existence or contents of said paper writing." Now, conceding that there may be some question as to whether such an agreement may be made to run with the land so as to affect a subsequent purchaser, yet, in every case when it is so held, it is subject to the equitable qualification that the purchaser had notice of the agreement. In treating the subject, Mr. Pollock says: "All these rights and liabilities, being purely equitable, are, like all other equitable rights and liabilities, subject to the rule that purchase for value without notice is an absolute defence." Pol. Cont. 226; 2 Pom. Eq. Jur. § 689. And we may further observe that to give them such effect as against a purchaser without notice would not only be inequitable, but contrary to the policy of our recording statutes. The fact that the defendant was in the possession and occupation of its road over the land at the time the plaintiff purchased does not amount to constructive notice of the existence of such agreement. Such possession would be notice of the usual incidents of such a right of way, but not of such as are exceptional. The general duty to fence its track is imposed by statute upon a railway company. This was the statute at the time the plaintiff purchased. The right asserted by the defendant is exceptional to its statutory duty, and its possession was not, therefore, constructive notice to the plaintiff of its existence. There must be some visible, material object upon or connected with the land the sight of knowledge of which would reasonably suggest the existence of the right to constitute constructive notice. 2 Pom. Eq. Jur. § 600. No such object is shown to have existed in this case from which it might reasonably have been inferred that the owner of the land purchased by the plaintiff was under an obligation to fence as claimed. Nor had there been any such exaction of the right upon the one

Purchaser of
lands not
bound without
notice of cove-
nant.

hand, or performance of the duty upon the other, as would, by its notoriety, amount to notice. Had the instrument been properly executed, acknowledged, and recorded, it would have constituted notice; but such was not the case, and the rights of the defendant under it are purely of an equitable nature, and cannot avail against a purchaser without notice. The provision contained in section 3329, Rev. St., to the effect that section 3324 shall not be held to affect "any contract or agreement" between "any railroad" and "the proprietor of lands adjoining," for "the construction and maintenance of fences," is limited by its terms to parties to the agreement; and while we have no doubt but that such agreements may be made to attend the ownership of the lands adjoining the road, yet this can only be done against such as purchase with notice, actual or constructive. Judgment affirmed.

When Covenants to Build and Maintain Fences Run with the Land.—An agreement to maintain a fence between lands granted and those of the grantor will not be construed as a condition, but as a covenant. *Hartung v. Witte*, 59 Wis. 285. But where the agreement is expressed as a condition with a clause of forfeiture, it must be construed as a condition. *Emerson v. Simpson*, 42 N. H. 475.

A covenant in a deed to maintain fences concerns the land, and is not collateral. It therefore runs with the land. *Kellogg v. Robinson*, 6 Vt. 276; *Hazlett v. Sinclair*, 76 Ind. 488; *Hartung v. Witte*, 59 Wis. 285; *Kentucky Cent. R. Co. v. Kenney* (Ky.), 20 Am. & Eng. R. Cas. 458.

A covenant which binds not only the covenantor, but also, in express terms, his heirs and assigns, to build and keep up a fence along the right of way runs with the land. *Easter v. Little Miami R. Co.*, 14 Ohio St. 48. The grantor of a deed conveying a right of way to a railroad company covenanted that he would "make and maintain a sufficient fence through the whole length of that part of the railroad which runs through my farm; this covenant of maintaining the fence to be perpetual and obligatory upon me and all persons who shall become owners of the land on each side of the railroad." *Held*, that the covenant ran with the land, and constituted an encumbrance within the meaning of the covenant against encumbrances in a subsequent deed. *Bronson v. Coffin*, 108 Mass. 175. Where, at the time of making a conveyance of a right of way, it was agreed, as part of the consideration, that the railroad company should construct two farm-crossings and two cattle-guards, if required by the grantor, in some suitable and proper place where the grantor should elect, the agreement is purely personal, and is not a covenant running with the land. *Cook v. Milwaukee & St. P. R. Co.*, 36 Wis. 45.

In *Parish v. Whitney*, 3 Gray (Mass.), 516, it was held that a stipulation in a deed poll that the grantee, his heirs and assigns, should erect and perpetually maintain a fence between the land granted and other land of the grantor was neither a condition nor a covenant, running with the land or otherwise, but was only a personal agreement of the grantee, evidenced by his acceptance of the deed, which did not affect the estate. See also *Kennedy v. Owen*, 136 Mass. 199. But in *Burbank v. Pillsbury*, 48 N. H. 475, the case of *Parish v. Whitney* was criticised, and it was held that such an agreement was of the same effect as an express covenant signed and sealed by the grantee, and that it ran with the land. See also *Kellogg v. Robinson*, 6 Vt. 276.

A deed of land contained, at the end of the description of the premises conveyed, the words, "provided always that the party of the second part shall fence and keep fenced the premises above described." *Held*, that the clause was to be construed as a covenant, and not as a condition, and that it ran with the land. *Countryman v. Deck*, 13 Abb. N. C. (N. Y.) 110.

A covenant to *build* and maintain a fence is only personal, and does not run with the land. *Hartung v. Witte*, 59 Wis. 285.

A parol agreement to maintain fences does not run with the land, but affects the parties to the agreement only. *Kentucky Cent. R. Co. v. Kenney* (Ky.), 20 Am. & Eng. R. Cas. 458. See also note 20 *Ib.* 345.

CHICAGO AND ATLANTIC R. CO.

v.

BARNES.

(116 *Ind.* 126.)

Fences—Contract to Construct and Maintain—Breach—Insufficient Gate Fastenings.—Where a railroad company, in part consideration for a deed conveying a right of way, agrees to build and maintain a good and sufficient fence upon both sides of the right of way and farm-crossings with cattle-guards, a failure to construct cattle-guards at a farm-crossing, and to make the fastenings of the gates secure for a continuous period of about two months, constitutes a breach of the contract, and the owner of the lands may maintain an action against the company for damages for stock escaping and killed upon defendant's track in consequence of the breach.

Same—Breach of Contract—Measure of Damages—Cost of Fence—Value of Cattle.—In such action, the value of the cattle, and not the cost of erecting and maintaining a secure and sufficient fence, is the measure of damages.

APPEAL from Circuit Court, Porter County.

Action for damages for stock alleged to have been killed through the failure of the defendant to erect and maintain a good and sufficient fence in terms of a contract entered into by it. The defendant appeals from a judgment entered for the plaintiff on special findings of fact.

Jacob S. Slick and *W. O. Johnson* for appellant.

William Johnston for appellee.

ELLIOTT, J.—A mare and a bull belonging to the appellee were struck and killed by one of the appellant's locomotives on the 2d day of May, 1884. The facts which control the controversy are thus stated in the special find-
ing: "The animals entered on the right of way and track of the defendant at a private road-crossing made by the defendant to

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enable the plaintiff to pass to and from his fields situate immediately north and south of the defendant's right of way, which the plaintiff had long used. The defendant's road runs east and west through plaintiff's farm where the crossing was made. The defendant obtained its right of way by conveyance from the plaintiff. As part consideration for the execution of the deed, it was stipulated therein as follows: 'Said company agrees to build and maintain a good and sufficient fence upon both sides of the right of way and farm-crossings, with cattle-guards for the width of space of three rods on each side of the centre line of said railroad, as now located, making six rods in width, and for the distance between the limits of said tracks.' The defendant accepted the deed, constructed its road, and built a substantial fence on both sides of the right of way through plaintiff's land, and also built substantial gates at the private crossing in the line of fences, but has failed and neglected to construct the cattle-guards on the sides of the crossing. Continuously for two months or more before the killing of said animals the gate fastenings were insufficient, and did not securely hold the gate in place, and did not constitute a sufficient fence to keep cattle and horses from entering thereat upon the defendant's right of way and track. This fact was well known to both plaintiff and defendant for a long time prior to the date of the killing of said animals, to wit, for the period of two months or more. Neither the plaintiff nor the defendant made any effort to provide the gates with proper or sufficient fastenings. Immediately before the plaintiff's animals were killed they were feeding on his pasture on the north side of the road, and passed from that field, through an open gate at the private crossing, onto the defendant's track."

The question in this case is whether the trial court did right in awarding a recovery; for, if the facts entitled the appellee to a recovery, then the judgment will not be reversed, although some one of the conclusions of law stated by the court may be erroneous. If the ultimate conclusion of the court is right upon the facts, an intermediate error in stating a conclusion of law which is not of controlling force will not authorize a reversal. *Krug v. Davis*, 101 Ind. 75; *Bothwell v. Millikan*, 104 Ind. 162. Where an erroneous conclusion of law leads to an erroneous judgment, it will, of course, require this court to set aside that judgment; but it is manifest that an intermediate error, which does not materially affect the final conclusion, cannot be sufficient cause for reversing the judgment. We do not, therefore, deem it necessary to inquire whether the trial court was or was not right in stating, as one of the conclusions of law, that it was the primary duty of the appellant to build and maintain secure fences, and that the "contract only afforded an additional as-

surance that the duty which the law enjoined would be performed."

There was a valid contract between the parties, founded upon a valuable consideration, and designed to accomplish a designated object. Contracts are, as a familiar elementary rule declares, to be construed by the light of attendant circumstances, and with reference to the object it was the intention of the parties to accomplish. Indiana, B. & W. R. Co. v. Adamson, 114 Ind. 282. It is quite clear that the construction given the contract

Right of action
accrued on
breach of con-
tract.

by the trial court is such as this rule commands. It imposed upon the appellant the obligation of providing a safe private crossing, and of erecting and maintaining a secure fence. For a breach of the duty created by the contract the appellee had a right of action. Whether the action could be maintained if there were no such contract is not the question. The question is, was there a breach of the contract, and did loss result to the plaintiff from that breach? It is argued that the measure of damages is not the value of cattle killed, but the cost of erecting and maintaining a secure fence. The principle declared in Louisville, N. A., etc., R. Co. v. Sumner, 106 Ind. 55, 24 Am. & Eng. R. Cas. 641, rules here, and decides this question against the appellant. Where a railway company obtains a right of way through a farm, and in consideration of the grant agrees to erect and maintain a secure fence, it is bound to pay for animals killed by its trains in cases where the animals enter upon the track through the fault of the company in failing to fence the crossing in accordance with the terms of the contract. Donald v. St. Louis, K. C. & N. R. Co., 44 Iowa, 157; Smith v. Chicago, C. & B. R. Co., 38 Iowa, 518; Fernow v. Dubuque & S. W. R. Co., 22 Iowa, 528; Chicago & R. I. R. Co. v. Ward, 16 Ill. 522; Conger v. Chicago & R. I. R. Co., 15 Ill. 366; Joliet & N. I. R. Co. v. Jones, 20 Ill. 222; Poler v. New York Cent. R. Co., 16 N. Y. 476; Hull v. Chicago, B. & P. R. Co., 22 N. W. Rep. 940, 20 Am. & Eng. R. Cas. 341; Raridon v. Central Iowa R. Co., 19 Am. & Eng. R. Cas. 615. The facts stated make a *prima facie* case for the appellee; for they show a valid contract to make a secure fence, a breach of this contract, and that the animals got upon the track because the fence was not such as it was appellant's duty to erect and maintain. If it had appeared that the gates were left open by the appellee, or by some wrong-doer other than the appellant, we should, perhaps, be required to hold that there was no liability; but no such facts appear. We do not believe it was necessary for the special finding to state that the gate was not left open by the appellee or by a wrong-doer; for certainly the plaintiff was not bound to prove these facts in order to make out his case. He was

bound to prove the contract, the appellant's breach, and loss resulting from it; but he was not bound to anticipate and overthrow defences that might have availed the appellant.

Judgment affirmed.

Breach of Contract by Railroad to Maintain Fence.—See *Kentucky Cent. R. Co. v. Kenny* (Ky.), 20 Am. & Eng. R. Cas. 458.

NASHVILLE, CHATTANOOGA AND ST. LOUIS R. CO.

v.

HEMBREE.

(*Alabama Supreme Court, December 14, 1888.*)

Stock-killing—Reduction of Speed when Approaching Crossing.—Under Ala. Code 1876, § 1699, railroad companies are only required to reduce the speed of their trains when approaching road-crossings in "a curve or cut where the engineer cannot see at least one quarter of a mile ahead," and it is error in an action for damages for killing stock to instruct the jury that it is the duty of railroads to check the speed of their trains when approaching a public crossing, when the undisputed evidence shows that the killing took place in an open field, the ground being level and there being neither curve nor cut in that part of the road; that the train was approaching and was within 175 or 200 yards of a flag-station; and that there was a public road-crossing ahead of the train and within 300 or 400 yards of the scene of the collision.

Same—Duty to Give Signals.—The duty to blow the whistle or ring the bell when approaching a depot, public crossing, etc., is intended for the safety of persons at the depot, or crossing the track, and has no reference to stock running at large at a place at which there is no crossing.

Same—Duty of Engineer to Prevent Accident—Instruction.—If there is evidence tending to show that the engineer was competent, was keeping a proper lookout, and did not and could not see the approaching animal until it was too late to give the cattle-alarm or check the train to prevent the injury, it is error to charge the jury that the defendant is liable unless its servants or agents in charge of the train did all in their power which they could reasonably do to avoid the killing, without qualifying the charge by requiring the jury to be satisfied that there was no fault in not sooner discovering the stock, and that when discovered, it was possible by the exercise of diligence to prevent the accident.

Same—Instruction—Negligence Causing Accident.—An instruction in a stock-killing case, that if the defendant, by its agent or servants, was guilty of negligence in killing the animal, a verdict must be returned for the plaintiff, is erroneous as subjecting the defendant to liability for negligence other than that causing or contributing to the injury.

Same—Killing Without Fault of Engineer—Instruction.—In an action for killing stock, when the evidence tends to show that the engineer was keeping a proper lookout, that he was ignorant of the proximity of the

stock until his fireman warned him that stock were approaching; that the mare in controversy jumped upon the track in front of the engine and was killed; that it was impossible for the engineer to have averted the injury; and that he put on the air brakes, reversed the engine, and did all he could to avert it, the defendant is entitled to an instruction that if the jury believe the evidence they must return a verdict in its favor.

APPEAL from Circuit Court, Jackson County.

Action by A. B. Hembree against the Nashville, Chattanooga & St. Louis R. Co. for damages for negligently killing a mare belonging to the plaintiff. Testimony was introduced on behalf of the plaintiff, tending to show that the engineer of the train which killed the mare did not blow the cattle alarm or slacken the speed of the train, and that if the engineer had kept a proper lookout he must have seen the mare in sufficient time to avoid injuring her. For the defendant, the engineer testified that at the time of the accident he was at his post; that he kept a steady and diligent lookout; that he was ignorant of the proximity of plaintiff's mare to the track until his fireman said to him: "Look out! Some horses are running towards the track;" that just then a horse jumped across the track and then the mare in controversy jumped upon it, was struck by the engine, and killed. The engineer also testified that he blew the whistle at the signal-post about a quarter of a mile before reaching a flag-station, in the vicinity of which the accident happened, and that the bell was rung at intervals until the train had passed the station. The engineer also testified that he could not have avoided injuring the mare after he saw her; that he applied the air brakes, reversed the engine, and did all that he could to avoid an accident. The court instructed the jury as to the duty of the defendant to reduce the speed of its trains when approaching a crossing or station, and also gave the following instructions at the plaintiff's request: "(1) If the jury are reasonably satisfied that the mare was killed by the defendant's train at the time alleged, then, unless defendant has reasonably satisfied the jury that its agents or servants in charge of its train did all in their power which they could reasonably do to avoid the killing, it is liable, and they must find for the plaintiff. (2) If the jury are reasonably satisfied that the defendant, by its agents or servants, were guilty of negligence in killing the mare, then they must find for the plaintiff." The court refused to give the following instruction at defendant's request: "If the jury believe the evidence, they must find for the defendant." A verdict having been returned for the plaintiff, the defendant appeals.

Humes, Walker, Sheffey & Gordon for appellant.

Brown & Kirk for appellee.

STONE, C.J.—The present action was brought for the recovery of damages for the alleged negligent killing of a mare by appellant's train. The testimony is without conflict

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on the following propositions: The killing took place in an open field, the ground being level, and neither curve nor cut in that part of the road. The train was approaching and was within 175 or 200 yards of a flag-station, at which it made no stop, except when signalled, and it was not signalled on that occasion. There was a public road crossing ahead of the train, and within three or four hundred yards of the scene of the collision; and the train was running at the rate of 20 to 30 miles an hour, and defendant neither stopped nor was checking the speed of its train as it approached the station. Under the undisputed facts in this case, the circuit court erred in instructing

Speed and signals at crossings.

the jury that it was the duty of the railroads to check the speed of their trains when approaching a public crossing. That duty is simply statutory, and only applies to road-crossings in "a curve or a cut, where the engineer cannot see at least one fourth of a mile ahead." Code 1876, § 1699; *Railroad Co. v. Deaver*, 79 Ala. 216. The duty to blow the whistle or ring the bell when approaching a depot, public crossing, etc., is intended for the safety of persons, stock, etc., who may be at the depot, or who may chance to be crossing the track, as the case may be. It has no reference whatever to stock running at large, and not injured at the crossing. Proximity to the depot or crossing should exert no influence in the decision of a case like the present one.

The first charge given at the instance of plaintiff is erroneous. We have frequently said the impossible need not be attempted.

Duty of engineer.

Railroad Co. v. Deaver, 79 Ala. 216; *Railroad Co. v. McAlpine*, 80 Ala. 73; *Railroad Co. v. Caldwell*, 83 Ala. 196, 3 South. Rep. 445. If the engineer was competent, and was keeping a proper lookout, and did not and could not see the approaching horses until it was too late to give the cattle alarm, or check the train in time to save the mare, the law did not require him to do anything. Engineers are not required to do all in their power, nor to do anything, when it is manifest that nothing they can do can possibly prevent the injury. The charge would have been correct if it had contained this additional clause: "Unless the jury are reasonably convinced that there was no fault in not sooner discovering the mare, and that when discovered no amount of diligence could have prevented the collision." Charge 2 given at the instance of plaintiff is incorrect. Only such negligence as causes or contributes to the injury is actionable. *Railroad Co. v. Caldwell*, 83 Ala. 196, 3 South. Rep. 445.

When the plaintiff showed that the mare was killed by de-

fendant's moving train, if there had been no other proof, he was entitled to recover. In other words, the duty or burden was then cast on the railroad company of showing that it employed proper diligence to prevent the injury complained of, or that without fault or inattention on its part it failed to discover the peril until it became so imminent that no skill or diligence could avert the danger. Either of these is a perfect defence to an action brought for the injury. In the absence of such defence, fairly proved, it is the sworn duty of the jury to find for the plaintiff. But when such exculpatory proof is made, and testified to in such manner as to command respect and confidence, it is equally the sworn duty of the jury to give to such testimony fair and unprejudiced consideration. If it reasonably convinces their judgment of its truth, they cannot innocently disregard it. *Railroad Co. v. McAlpine*, 75 Ala. 113. Railroads are prized for the rapidity with which they transport persons and things. Speed is possibly their highest excellence. Much legislation has been enacted for the regulation of this relatively new species of common carrier, but, with the exception of specified places, no restraint has been imposed on their rate of speed. This has been left to their own arbitrament. Hence it cannot be affirmed that, outside of prohibited places, there is any restriction in the velocity of its movements. Still locomotives, with the trains they draw, are "powerful for mischief as well as for good." For this reason we have held "that only very careful and prudent men should be placed in charge of such vehicles of transportation, and they shall employ their care and prudence actively, as such men watch over their own important interests and enterprises of similar magnitude and delicacy." *Grey v. Trade Co.*, 55 Ala. 387; *Tanner v. Railroad Co.*, 60 Ala. 621; *Tyson v. Railroad Co.*, 61 Ala. 554. And the appointees must be skilled, as well as prudent and diligent. On the other hand, if the officer in control of the train is skilled in his profession, is watchful, and a dumb animal comes on the track in front of and in such proximity to the train as that the latter cannot be stopped in time to save the animal, then the engineer need do nothing, for he need not attempt the impossible. In such case the railroad company is not liable, unless with proper watchfulness, considered in connection with his other duties, the engineer could have discovered the approaching animal in time to frighten it away with the cattle alarm, or stop or check the train so as to prevent the collision. It is not every injury a train may inflict that fastens a liability on the railroad company. If a law were so to declare it would be unconstitutional. *Zeigler v. Railroad Co.*, 58 Ala. 594. And juries, under their oaths, cannot establish a rule for

Burden of
proof—Duty of
those operat-
ing railroads.

their government, and act on it, which, if declared by the legislature, would be adjudged unconstitutional. The true and only rule, sanctioned alike by law and by conscience, is to hold the railroad company liable, whenever the injury is the result of negligence, or want of skill in its officials, under the rules laid down above. This is right in itself, and stands on the same footing as any injury suffered through the unskilfulness or negligence of another, save in the single matter of the burden of proof. But when the injury is not the result of negligence or unskilfulness, but, under the rules above, is unavoidable, then the railroad company is not liable; and to hold it so is a gross impropriety, and a great wrong. *Railroad Co. v. McAlpine*, 75 Ala. 113. There is no substantial conflict in the evidence tending to prove the circumstances under which the mare was killed. If believed, the railroad company was not liable. The general charge asked by defendant ought to have been given. *Railroad Co. v. Bayliss*, 74 Ala. 150. Reversed and remanded.

Stock-killing—Negligence—Proximate and Sole or Immediate Cause.—The provisions of the Ala. Code, 1876, §§ 1699–1702, that railroad companies shall be liable for damages to personal property resulting from its failure to comply with statutory requirements, or other negligence of the company, only requires that the injury must be the natural and proximate consequence of the negligence, and not that the negligence should necessarily be the sole or immediate cause of the injury. *Western Railway of Alabama v. Sistrunk*, Ala. Sup. Ct., Dec. 4, 1888.

Same—Failure to Ring Bell or Blow Whistle.—If a compliance with the statutory duty to ring the bell or blow the whistle imposed by Ala. Code, 1876, §§ 1699–1702, would have prevented injuries to live stock, the company is liable therefor when there is no question as to the plaintiff's contributory negligence. *Western Railway of Alabama v. Sistrunk*, Ala. Sup. Ct. Dec., 4, 1888.

Same—Running Train at High Speed not Negligence per se.—In the absence of any statute or ordinance requiring railroad companies to run their trains at a reduced speed, it is not negligence *per se* authorizing a recovery for the killing of stock for a company to run its train at any rate however rapid. *Western Railway of Alabama v. Sistrunk*, Ala. Sup. Ct., Dec. 4, 1888. The court said: "The court erred, however, in giving the second charge requested by the plaintiff, which asserted that, if the railroad locomotive was running at a very rapid rate of speed at the time the mules were struck, and the injury occurred because of this fact, the defendant would be liable. The statute does not regulate the speed of railroad trains in passing stations or crossings, except when entering 'a curve crossed by a public road,' where the engineer cannot see at least one fourth of a mile ahead. Here he 'must approach and pass such crossing at such speed as to prevent accident in the event of an obstruction at the crossing.' Code 1886, § 1144; Code 1876, § 1699. The movements of trains in towns and cities are authorized to be regulated by the municipal authorities. Code 1886, § 1519. Except so far as changed by statute, no particular rate of speed, however rapid, can *per se* or as matter of law be evidence of negligence. And it is quite proper in this progressive age of inventions in science and art, when the necessities of commerce are every day demand-

ing more rapid transit, that no such unprogressive rule of law should be promulgated by our courts. The authorities are uniform in support of this view, and I trust always will be. *East Tenn., Va. & Ga. R. Co. v. Deaver*, 79 Ala. 216; *Tonawanda R. Co. v. Munger*, 49 Am. Dec. 267, note, and cases cited; 2 *Shear. & R. Neg.* § 478. It has often been held, under statutes similar to our own, that the mere fact that a train was running at a very rapid speed, even at a crossing, is not sufficient evidence of negligence to render the company liable for injury to cattle. *Toledo, W. & W. R. Co. v. Barlow*, 71 Ill. 640; *Plaster v. Illinois Cent. R. Co.*, 35 Iowa 449; *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141. Where the statute is inapplicable, the question of negligence *vel non* must be governed by the rules of the common law. *Louisville, etc., R. Co. v. Com.*, 26 Am. Rep. 205, and note, 207-211; *Deaver's Case*, 79 Ala. 216, *supra*. The charge under consideration was a clear violation of these principles."

Same—Negligence at Common Law—Excessive Speed—Failure to Keep Lookout.—Plaintiff's cow was struck by defendant's engine at a crossing within the limits of a city. The engine which did the injury was running at the rate of from 10 to 12 miles per hour, which was greatly in excess of the speed limited by an ordinance of the city. The view between the place where the cow was struck and the approaching engine was unobstructed for about 250 feet. The speed of the train was not decreased before the engine struck the cow, nor was the bell rung or the whistle blown. The engineer and fireman were looking out of the cab window at the side of the engine in the direction of a public gathering on one side of the railroad track. *Held*, that the facts showed such negligence on the part of the defendant as entitled the plaintiff to recover at common law. *Colorado Cent. R. Co. v. Caldwell*, Colo. Sup. Ct., Oct. 26, 1888.

Same—Sufficiency of Fence—Nonsuit.—When the evidence as to the sufficiency of a fence maintained by a railroad company is conflicting, but there is testimony tending to show that it was not such as was required by law, and there is no evidence of contributory negligence on the part of the plaintiff, a motion for a nonsuit ought to be refused. *Welch v. Abbott*, Wis. Sup. Ct., Nov. 8, 1888.

Same—Cause of Injury—Misleading Instruction.—In an action to recover damages for killing stock, it appeared that a calf was found from 60 to 70 feet from the track with one of its legs cut off. No blood or hair was discovered on the track. The court instructed the jury that they must take into consideration the testimony tending to show where the heifer was before and after the time of the alleged injury, when and where she was found, the nature of the injury, the presence or absence of other causes to account for such injuries, what trains, if any, had passed after the heifer was seen before the injury and the time she was found to be injured, and all facts tending to show whether the heifer was injured by the defendant's train of cars. *Held*, that although the charge did not refer to the fact that no blood or hair was found upon the track, it was not open to the objection on the part of the defendant that it was one-sided. *Taylor v. Chicago, St. P. & K. C. R. Co.*, Iowa Sup. Ct., Oct. 30, 1888.

Same—Tender as Admission of Obligation to Fence.—When a railroad company in an action to recover damages for injury to stock pleads a tender of damages as a distinct defence, it admits that it ought to have fenced, and is liable for a failure to do so, though a general denial in another count covers such issue, and by the Iowa Code, § 2710, inconsistent defences may be pleaded. *Taylor v. Chicago, St. P. & K. C. R. Co.*, Iowa Sup. Ct., Oct. 30, 1888.

Same—Sufficiency of Evidence to Support Verdict for Plaintiff.—Plaintiff's mare was found in a field some distance from the railroad track with her left hind leg broken, with a bruise on her left fore leg and a bruise on

her head. The ground was covered with snow at the time, and the mare was tracked back to a point opposite a cattle-guard in the road, where it was discovered that she had either fallen or been thrown by one of defendant's locomotives. It was claimed by the plaintiff that the mare was struck by an engine approaching the cattle-guard and carried along to the guard, and thrown off to one side. The evidence was sufficient to warrant the jury in finding that the injured leg was not merely fractured, but was also crushed. There was an absence of blood, or other evidence of a struggle of the animal at the guard, which indicated rather that she was pitched or thrown into the snow by an engine than that she fell into the guard and extricated herself. It also appeared that there were tufts of hair found inside one of the rails of the road for some distance back from the culvert, and that, in color, the hair corresponded with the color of the hair on the mare's legs. *Held*, that the evidence was sufficient to justify the jury in returning a verdict for the plaintiff. *Cox v. Burlington & W. R. Co.*, Iowa Sup. Ct., May 16, 1889.

Same—Negligently Obstructing Crossing—Instruction.—In an action to recover damages for stock killed, where it appears that the company wrongfully obstructed a street with an engine and cars and the stock were thereby frightened and caused to run onto the track and were killed by defendant's trains, an instruction that if the defendant obstructed the street except for the purpose of loading or unloading passengers, and such obstruction was the cause of the animals being turned upon the track, "whereby the injury complained of was sustained, they must find for plaintiffs," unless plaintiffs could have prevented the stock from "reaching said point of crossing" by reasonable diligence, assumes that the killing necessarily resulted from the stock being turned upon the track, and fails to require as a condition precedent to recovery that plaintiff's should have used reasonable diligence to secure the animals after they passed the crossing and went upon the track, and is therefore erroneous. Under such circumstances, a recovery can be had although the railroad company was only guilty of ordinary, and not gross, negligence. *Richmond & D. R. Co. v. Noell*, Va. Sup. Ct. App., April 11, 1889.

Same—Speed Exceeding Statutory Limit—Proximate Cause.—Although a train may have been run through the limits of an incorporated city at a greater speed than that limited by the statute (Miss. Code, § 1047), the company is not liable for stock killed unless the injury was caused by the unlawful rate of speed of the train, and whether it was so caused is a question for the jury. *Louisville, N. O. & T. R. Co. v. Carter*, Miss. Sup. Ct., Jan. 28, 1889.

Same—Excessive Speed—Municipal Ordinance.—Where property is injured by a train of cars in a city, in a suit against the railroad company to recover damages, on the ground of negligence on the part of such company in running the engine at too great a speed, the ordinance of the city limiting the speed of trains to six miles an hour within the corporate limits is proper evidence to go to the jury on the question of negligence.

Where such ordinance imposes a duty upon those in charge of railroad trains, a failure to discharge such duty may be considered by a jury in determining whether such railroad company was guilty of negligence where property has been injured or destroyed. *Union Pac. R. Co. v. Rasmussen*, Neb. Sup. Ct., Feb. 20, 1889.

Same—Statutory Signals—Order of Observance.—Under Mill. & V. Tenn. Code, § 1298, subsec. 4, which requires railroads to have "the engineer or fireman or some other person upon the locomotive always upon the lookout ahead, and when any person, animal or other obstruction appears upon the rail, the alarm whistle shall be sounded, the brakes put down and every possible means employed to stop the train and prevent an

accident," the engineer is not required to observe the precautions named in the exact order in which we have mentioned in the statute. It is his duty to observe all the precautions prescribed by the statute together with every other means at his disposal to stop the train and prevent an accident; but if, by reason of the suddenness of the appearance of the obstruction upon the track and its proximity to the train, it was impossible to observe each precaution, then it is his duty to adopt such of the requirements and precautions as under all the circumstances are best calculated and most effectual to prevent the accident. A mule appeared on the track some 15 or 20 yards in front of a passenger train which was running at the rate of 30 miles an hour. The engineer testified that it would be impossible to stop the train within 200 yards. The engineer immediately put on the air-brakes and reversed the engine, and by the time he had done this, the animal was struck and killed. The engineer further testified that he was so close to the mule when she came upon the track that he had no time to do more than he did do to stop the train; that for this reason he did not blow the whistle or ring the bell; and that the only effect the blowing of the whistle could have had was that it might have frightened the mule from the track. *Held*, that as the blowing of the whistle according to the engineer's admission might have frightened the animal from the track, it was his duty to have resorted to that precaution. *Memphis & C. R. Co. v. Scott*, Tenn. Sup. Ct., April 9, 1889.

Same—Statutory Signals when Approaching Crossing—Duty to Check Train.

—The evidence showed that when a train arrived at a blow-post 400 yards from the public crossing, the whistle was blown according to the statute; and that about the same time the engineer saw plaintiff's mules come upon the track at the crossing 400 yards distant, and turn up the track in the direction of the train. He immediately signalled for brakes, gave the stock alarm, sanded the track, and reversed the engine. When the engine collided with the mules he had reduced the speed from 12 miles to 4 miles an hour, and had run only 320 of the 400 yards between the blow-post and the crossing, the mules having gone 80 yards towards the engine. The conductor and the engineer both testified positively that the speed of the train had been so checked that it could have been stopped before it reached the crossing. It appeared further that the mules had escaped from the plaintiff's lot and were being pursued by one of his servants, and to avoid this pursuit they ran upon the track toward the engine. *Held*, that the facts were not sufficient to sustain a verdict for the plaintiff. *Held* also, that as the statute only required the engineer to blow his whistle at the blow-post, and to check his train so that he might be able to stop at the crossing, no duty was imposed upon him to check his train before reaching the blow-post by reason of the fact that he was travelling on a down grade, it appearing from the evidence that the train could have been stopped before reaching the crossing. *Crawley v. Georgia R. Co.*, Ga. Sup. Ct., Nov. 30, 1888.

Same—Wilful Act of Engineer—Sufficiency of Evidence to Support Allegation.—In an action to recover damages for negligently killing a cow at a crossing, the engineer in charge of the engine testified that he did not see the cow upon the track until he was within about 100 feet of the crossing, and that he had no intention whatever of running upon the animal. It did not appear that the train was being run at a dangerous or unusual rate of speed, nor was it shown that the crossing was of such a character as to make it the duty of the engineer to be on the lookout for animals, or take extraordinary precautions. *Held*, that in the absence of evidence tending to contradict the engineer's testimony, an action founded upon the alleged wilful act of the engineer could not be maintained. *Indiana, B. & W. R. Co. v. Overton*, Ind. Sup. Ct., Feb. 2, 1889.

Same—Wilful Injury—Varlance—Pleading—Evidence.—When the plaintiff, in an action to recover damages for killing stock, has sued for an intentional and wilful injury, he is not entitled to recover on the ground that the engineer negligently failed to discover the animal, or negligently failed to stop his train or frighten the animal off the track. *Indiana, B. & W. R. Co. v. Overton*, Ind. Sup. Ct., Feb. 2, 1889.

Same—Evidence Insufficient to Show Defendant's Negligence.—Plaintiff permitted a heifer to run at large on lands contiguous to defendant's railroad track. The heifer came upon the track at a point about 50 feet in advance of a moving train, and was struck by it and killed. The animal was first discovered by the engineer in a narrow cut, a short distance around a curve from the direction in which the train was moving. The train, composed of 15 loaded freight cars, was running at the rate of from 12 to 15 miles an hour on a down grade at the time when the animal was discovered on the track. The engineer and trainmen were looking out for cattle, as it was usual to find them on the track in that neighborhood. As soon as the animal was seen, the engineer applied the brakes, and gave the usual signals for stopping. The whistle was also blown repeatedly for the purpose of frightening the animal from the track. There was no complaint or proof that the engine or train was not properly equipped, nor was there any evidence tending to show that the engineer was guilty of negligence in the manner of running his train, or that the engineer or trainmen were incompetent or negligent in the discharge of their duties. *Held*, that a verdict for the plaintiff could not be sustained. *Gay v. Fremont, E. & M. V. R. Co.*, Dak. Sup. Ct., Feb. 9, 1889.

Same—Fog—Impossibility of Stopping Train.—When the uncontradicted testimony of the train hands is that the accident took place early in the morning before daylight, and that there was a fog prevailing at the time, which prevented plaintiff's mules from being seen at a distance in which it was possible to stop a train, the presumption of negligence arising from the killing of stock is rebutted, and the plaintiff cannot recover. *Georgia R. & B. Co. v. Wall*, 80 Ga. 202; *Georgia, N. & G. R. Co. v. Harris*, Ga. Sup. Ct., May 24, 1889.

Same—Killing Hogs—Sufficiency of Fence.—In an action to recover damages from a railroad company for the killing of hogs in a township where they were not permitted to run at large, and the hogs escaped from plaintiff's pen without his fault and strayed upon the track of defendant's railroad, passing through plaintiff's farm, where they were killed without negligence of the company; and went on the track under a gate, the lower board of which was 39 inches from the ground, and except this gate the road was enclosed by a lawful wire fence which would not have prevented the hogs from going on the track anywhere,—*held*, that the company is not liable to the owner of the hogs killed. *Leebrick v. Republican Valley & S. W. R. Co.*, Kan. Sup. Ct., June 7, 1889, following *Atchison, T. & S. F. R. Co. v. Yates*, 21 Kan. 613.

Same—Duty to Ring Bell or Blow Whistle when Approaching Crossing.—In Pennsylvania, the engineer of a train does not owe any duty to the owner of stock running at large to ring the bell or sound the whistle as the engine approaches a crossing near which the stock has entered upon the track. *Fisher v. Pennsylvania R. Co.*, Pa. Sup. Ct., May 6, 1889.

Same—Duty to Check Train when Cattle Seen Near Track.—Plaintiff's cattle got on to and attempted to cross the track within a few yards of an engine running at the rate of from 20 to 30 miles an hour. The uncontradicted testimony was to the effect that the engineer did not see the cattle until they were so near the engine that he could not check or stop the train in time to save them, and that he sounded the whistle or stock alarm and did all he could under the circumstances to prevent the accident.

Held, that the railroad company was not liable because the engineer might have seen the cattle near the track, or could have reduced the speed of the train, or stopped it before they came upon the track. *New Orleans & N. E. R. Co. v. Bourgeois*, Miss. Sup. Ct., March 4, 1889. The court said:—

"We need not consider what degree of care, consistent with his other duties, was required of the engineer in keeping on the lookout for obstructions on the track, for if it be admitted that he saw the cattle near the track, before they came upon it, the view contended for cannot be sustained. If adopted without qualification, it would go far to destroy the value, and defeat the purposes for which railroads are constructed. Rapid movements and regular connections are among the chief advantages of transportation by railroads. These are demanded both by the interests of the public and of railroad companies. Railroad companies, in the prosecution of their lawful business, have a right to a clear track, and to the exclusive use and enjoyment of their property, subject, of course, to the condition upon which all others own and use property, that they must so use it as not to injure the person or property of others, if it can be avoided by reasonable care. Railroad companies are not liable in damages for every injury that may be inflicted by their trains. If a law were to declare them so liable, without reference to whether there was negligence or fault on their part or not, it would be unconstitutional, and void. *Zeigler v. South & N. A. R. Co.*, 58 Ala. 594. They are responsible for injuries caused by their negligence or want of skill or care; but there is no reason in law or morals for holding them to a stricter measure of accountability for inevitable misfortunes than would be exacted from natural persons for injuries which resulted from unavoidable accident. *Zeigler v. South & N. A. R. Co.*, *supra*. It cannot be said to be the duty of a railroad company to check the speed or stop its passing train every time an animal is seen near its track, unless there is something to indicate danger or the necessity of the animal going upon the track, and if an animal, when first discovered on the track, is so near the engine that collision cannot be prevented by the prompt use of all proper appliances, and the animal is killed or injured, no liability for damages is thereby incurred by the company. Impossibilities are no more required by law of railroad companies than of other persons. *Mobile & G. R. Co. v. Caldwell*, 83 Ala. 196.

"Ordinarily the discovery of animals near the road does not require checking the speed or stopping the train. That should occur only when it seems necessary to avoid collision. Something must be confided to the discretion of the engineer or person in charge of the train, and infallibility on his part is not expected or required. The use of the whistle or stock-alarm is generally sufficient to keep stock out of the way of the train. Unless appearances reasonably indicate danger of their going upon the track, neither the stoppage nor an effort to stop the train is required; but when existing conditions suggest such danger, they must be heeded, and failure to do so will constitute negligence. *Yazoo & M. R. Co. v. Brumfield*, 64 Miss. 637; *Little Rock & Ft. S. R. Co. v. Trotter*, 37 Ark. 593, 11 Am. & Eng. R. Cas. 475. In all actions against railroad companies for damage done to person or property, proof of injury inflicted by the running of the locomotives or cars of such company is *prima facie* evidence of the want of reasonable skill and care on the part of the servants of such company in reference to such injury. Code, § 1059. Such evidence, if there is none other, entitles the plaintiff to verdict, but such evidence is not conclusive. It may be rebutted and overcome, and the railroad company may acquit itself of negligence in the matter if it can; and where the circumstances attending the injury are shown by the evidence, the case must then be determined by the jury on the facts proved, and not upon any presumption of negligence created by the statute. *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693, 30 Am. & Eng. R. Cas. 587."

HINDMAN

v.

OREGON RAILWAY AND NAVIGATION CO.

(Oregon Supreme Court, May 20, 1889.)

Stock-killing—Oregon Fence Laws—Right to Recover on Proof that Track Unfenced.—The act of 1887, found in the Oregon Code of miscellaneous laws from and including section 4044 to and including section 4049, which provides, in effect, that a railroad company owning or operating a railroad in Oregon shall be liable for the value of stock killed, and for reasonable damages for stock injured, upon or near any unfenced track of its road, whenever such killing or injury is caused by any moving train, engine, or cars upon such track; that in every such action for the recovery of such value for stock so killed, or for damages for such injury to the same, proof of the killing or injury shall, of itself, be deemed and held to be conclusive evidence of negligence upon the part of the company; that contributory negligence on the part of the plaintiff in such action may be set up as a defence; but that the allowing of stock to run at large upon common, unfenced range, or upon inclosed land owned or in the possession of the owner of such stock, shall not be deemed or held to be such contributory negligence,—entitles an owner of stock to recover against a railroad company for such killing or injury of the same by alleging and proving that the company owned or operated the railroad, that its track was unfenced, and that the killing or injury was done on or near the track by a moving train, engine, or cars upon such track; and it is not necessary in an action in such a case for the plaintiff to allege negligence on the part of the company in any form.

Same—Failure to Fence as Evidence of Negligence.—Fencing the railroad track is not imposed upon the company as a duty, but the track being unfenced is a fact which, of itself, establishes conclusively that the company was guilty of negligence; and the only defence the company has is to plead contributory negligence upon the part of the plaintiff, or a wilful intent on his part to procure the killing or injury to be done.

Same—Duty of Owner to Confine Stock.—Said act does not, however, relieve the owner from the duty of keeping his stock within reasonable confines. He owes a duty to the public which requires him to use reasonable efforts to prevent it from going where it will imperil the safety and security of persons and property; and while he is allowed to depasture his horses and cattle upon "the common, unfenced range," without being chargeable with contributory negligence in case they are killed or injured as mentioned, yet he is not permitted to turn them out to roam wherever their instincts incline them.

Same—Contributory Negligence—Stock Running at Large.—Where H., therefore, brought an action against the O. R. & N. Co., a railroad corporation, for the recovery of the value of a certain bull, which he alleged was killed upon the railroad track of the latter by being run against and over by the company's train of cars at a place where the track was unfenced, and the company filed an answer to the effect that H. knowingly allowed the bull to range at large, outside of his inclosure, and upon the

railroad track; that the bull was so at large in violation of section 3393 of the Laws of Oregon; that the animal was there struck and killed by the company's locomotive; and that the killing was the result of the wrongful and unlawful act of H. in so allowing it to so range at large outside of the inclosure of H.,—*held*, that it constituted a good defence, whether the bull was at large in violation of said section 3393 of the Laws of Oregon or not; that the facts set forth in the answer showed contributory negligence on the part of H., and that the sustaining of the demurrer thereto by the lower court was error.

APPEAL from Circuit Court, Baker County.

The respondent herein commenced an action in justice's court, Baker precinct, Baker county, Or., against the appellant, a private corporation engaged in operating certain railroads in this state, to recover damages. He alleged in his complaint, in substance, that on the 22d day of April, 1888, he was the owner of a certain bull of the value of \$100; that said bull, without his fault, went upon the track and ground occupied by the appellant's railroad in said county of Baker, at a certain point where it was wholly unfenced and uninclosed; that the appellant, by its agents and servants, not regarding its duty in that respect, so carelessly and negligently ran and managed its locomotives and cars that the same ran against and over the said bull and killed it, for which the respondent demanded judgment for his damages in the sum of \$100 and costs. The appellant filed an answer to the complaint denying, upon information and belief, the value of the bull; denying that he went upon the track or grounds occupied by the appellant's railroad without the fault of respondent, but alleged that he went there through his fault and negligence; denied that by its agents or servants, or at all, it carelessly or negligently ran or managed said locomotives or cars, or that it managed or ran them so carelessly or negligently that the same ran against or over said bull, or killed it; denied that it, by its agents or servants, or otherwise, disregarded its duty in respect to its management of said locomotives or cars; denied that by reason of any careless or negligent act of appellant respondent had been damaged in any sum. The appellant, for a further and separate defence, alleged that the respondent, being the owner of said bull, knowingly allowed it to range at large out of his inclosure and upon the said tracks of appellant at the time in the complaint stated, in violation of the provisions of section 3393 of the Laws of Oregon, when said bull was struck and killed by its said locomotive, and alleged that said killing was due to the said wrongful act and conduct of the respondent in so knowingly allowing said bull to so range at large out of his inclosure. The respondent demurred to the new matter of defence set forth in the answer upon the ground that it did not constitute a defence to the cause of action stated in the complaint, which demurrer the court sus-

tained. The action was tried before the justice, who rendered a judgment therein in favor of the respondent and against the appellant for the sum claimed in the complaint and the costs of the action. The appellant took an appeal from the judgment of the justice to said circuit court. The demurrer to the matter of the defence set forth in the answer, having been argued by counsel in the circuit court, was sustained by said court, whereupon the issues of fact joined in the action by the said pleadings, aside from the part of the answer so demurred to, were thereupon tried by a jury, who returned a verdict for the respondent for the sum of \$37.50, upon which the judgment appealed from to this court was entered.

Rufus Mallory for appellant.

C. W. Manville for respondent.

THAYER, C.J.—It appears from the bill of exceptions, settled and signed by the circuit judge, and filed with the transcript in the case, that the bull in question, being upon the appellant's railroad track, was run over and killed by its train of cars that were regularly running upon its road. It does not appear, nor is it claimed by the respondent's counsel, that the appellant's agents or servants who were operating the train at the time of the casualty were guilty of any negligence in its management. The train was a freight train, consisting of about 20 cars; was on a down grade, when the bull and two steers were discovered upon the track, and those having control of it evidently did all in their power to avoid running over the animals. The two steers ran off the track, but the bull stayed on it until struck by the locomotive. The consequences resulted very seriously. The engine and some of the cars were thrown from the track, and the engineer and fireman both killed. The value of the bull as compared to the destruction of property and loss of life in consequence of his being upon the railroad track, where the respondent had no right to suffer him to be, whether it was fenced or not, is very slight and inconsiderable. The bill of exceptions shows that the appellant's railroad track was not fenced at the place where the bull was on the same when run over; and the counsel for the respondent bases his right to a recovery in the action upon that fact.

Common law
rule.

The liability of a railroad company for killing or injuring cattle upon its track arose, heretofore, out of negligence committed by the company in consequence of which the injury was done. There could be no recovery in such a case without an allegation and proof that the company was guilty of violating some duty it owed to the public, and that the injury and damage complained of resulted from its

failure to perform it ; and a recovery could not then be had if it appeared that the plaintiff was also guilty of negligence which contributed to the injury. An owner of cattle, who allowed them to run at large and stray upon a railroad track, was formerly deemed guilty of such a degree of negligence as would defeat his right to recover in consequence of their being run over and killed, unless he could show that the agents and servants of the company acted wantonly, wilfully, or recklessly in the affair. Permitting stock to go at large and stray upon a railroad track, where they would be liable to throw a train of cars off the track and kill and injure passengers and destroy property, was regarded as a gross neglect upon the part of such owner. The legislature, however, has somewhat innovated upon that rule by adopting the provisions contained in sections 4044, 4048, Misc. Laws Or. Statutory provisions.

These two sections, taken together, provide, in effect, that a railroad company shall be liable for the value of stock killed, and for reasonable damages when injured, upon or near any unfenced track of its road, whenever such killing or injury is caused by any moving train, engine, or cars upon such track, and in that every action for the recovery of such value for stock so killed, or for damages for such injury to the same, proof of the killing or injury shall, of itself, be deemed and held to be conclusive evidence of negligence upon the part of the company ; but contributory negligence on the part of the plaintiff in such action may be set up as a defence. The allowing of stock to run at large, however, upon common, unfenced range, or upon inclosed land owned or in possession of the owner of such stock, shall not be deemed or held to be such contributory negligence, and in any such action proof of wilful intent on the part of the plaintiff to procure the killing or injury of any such stock in the manner aforesaid shall defeat the recovery. Effect of the statute.

Under these provisions it would seem that a plaintiff is entitled to recover against a railroad company for the killing or injury of his stock by alleging and proving that the company owned or operated the railroad ; that its track was unfenced, and that the plaintiff's cattle or horses were killed or injured, as the case might be, on or near the track, by a moving train, engine, or cars upon such track ; that the company will be able to defeat recovery by proof of contributory negligence on the part of the plaintiff, but that allowing the animals to run at large upon common, unfenced range, or upon inclosed land owned or in the possession of the owner of such animals, will not be deemed or held to be such contributory negligence. The statute makes the killing or injury of stock in such case conclusive evidence of negligence upon the part of the railroad company, and I do not see that it

is necessary for the plaintiff to allege negligence in any form. Fencing the railroad track is not imposed upon the company as a duty, but it is a fact which, of itself, establishes conclusively that the company is guilty of negligence, and the only defence left to the company is to plead contributory negligence upon the part of the plaintiff, or a wilful intent upon his part to procure the killing or injury.

As to what will constitute contributory negligence in such a case must be determined by the courts. The statute has not attempted to settle that question further than to provide that allowing stock to run at large upon common, unfenced range, or upon inclosed land owned or in possession of the owner of the stock, will not be deemed or held to be such negligence. This clause of the statute must receive a reasonable construction. It must be construed like all innovations upon the rules of the common law. The old law, the mischief which the legislature is supposed to have had in view, and the remedy applied to correct it, must be considered. Enacting a provision that the allowing of stock to run at large upon common, unfenced range shall not be deemed or held to be contributory negligence certainly does not imply that its owner may allow it to roam wherever its propensity may influence it to go, uncontrolled and uncared for, and that the owner is entitled to recover its value if it goes upon a railroad track, and is run over by a train of cars. The legislature evidently did not undertake to relieve the owners of horses and cattle from the duty of keeping them within reasonable confines, although turned upon the "common, unfenced range." The owners of such stock owe a duty to the public,—the duty of keeping it away from localities in which it imperils the security and safety of persons and property. The legislature may not have intended by the act that such owners should employ herdsmen to constantly attend upon their stock and keep it within definite bounds, nor did it intend to permit them to turn their stock out to wander over the country generally. When the owner exercises proper care in such cases to keep his horses and cattle within reasonable limits, and away from unfenced railroads, and they escape from his control and go upon the track thereof, and are run over by "any moving train, engine, or cars," it could not be claimed that he was guilty of contributory negligence; but, on the other hand, if he allowed such animals to range wherever their instincts inclined them, and knowingly permitted them to go upon railroad tracks, he would, in my opinion, be guilty of such a degree of negligence as would preclude his right of recovery for their value if run over and killed by the cars. If I am correct in this view, then the defence of new matter set up by the appellant was a good defence.

Contributory
negligence—
Stock running
at large.

Whether the bull in question was at large in violation of said section 3393 of the Laws of Oregon, or not, it was sufficient that the respondent knowingly allowed the brute to range at large outside of his inclosure, and upon the appellant's railroad track, to defeat the alleged right of action. It was clearly contributory negligence.

A railroad company is doubtless liable, under the statute, for running its cars over cattle which go upon the track without the owner's fault, where the track is unfenced, as where the cattle escape from the range, or from the inclosure where they were kept; but it certainly cannot be held liable for so running over them when the owner knowingly allows them to range upon the track, unless the conduct of the agents or managers of the train has been wanton or reckless in the affair. Knowingly allowing the cattle to range upon the track, where they necessarily expose the lives and safety of the traveling public to constant danger, is, according to my notion, the highest degree of negligence upon the part of the owner, and should be regarded as contributing to the injury. The justice of the peace and the circuit court, in sustaining the demurrer to the new matter of defence set up in the answer, committed error, for which the judgment appealed from must be reversed; and, as the case stands, this decision is conclusive against the respondent's right of recovery therein.

Allowing cattle to range on track.

The facts set forth in the answer as a defence may not be true, but the respondent, by demurring thereto, admitted their truth. The circuit court, as I understand the rule, had no alternative but to sustain the demurrer, or to determine the case in favor of the appellant; as that court, upon appeal from the judgment of a justice's court, has no discretion except to try the case upon the issues as made up in justice's court. The case, therefore, has to be remanded to the said circuit court, with directions to overrule the demurrer to the answer, and render judgment upon the pleadings in favor of the appellant for costs, and that the respondent take nothing by his complaint.

Stock-killing—Contributory Negligence—Cattle Running at Large on Public Highway.—It is contributory negligence which will preclude a recovery for the owner of cattle to permit them to wander unattended in a public highway in the vicinity of a railroad crossing, in consequence of which they stray upon the track at the crossing and are killed. The fact that the animals are at large under the permission of the board of township commissioners does not aid the plaintiff's case. *Hanna v. Terre Haute & I. R. Co.*, Ind. Sup. Ct., June 7, 1889.

Same—Contributory Negligence—Block attached to Cow.—In an action to recover damages for killing plaintiff's cow which was on defendant's track with a block attached to her by a small chain, the plaintiff cannot complain of an instruction that "if the injury to the cow was in any degree the consequence or result of the block and chain attached to the cow at

the time . . . in preventing the escape of the animal from the road, and the injury would not have occurred but for that incumbrance preventing the cow getting out of the way, then defendant should have a verdict." *Guess v. South Car. R. Co.*, S. Car. Sup. Ct., Feb. 18, 1889.

MARTIN

v.

STEWART *et al.*

(*Wisconsin Supreme Court, February 19, 1889.*)

Fences—Destruction by Fire—Wisconsin Statute—Contributory Negligence.—Under the provisions of section 1810, Wis. Rev. Stat., as amended by laws of 1881, c. 193, that until fences and cattle-guards shall be duly made, railroad companies shall be liable for all damages done to cattle thereon, occasioned in whole or in part by the want of such fences, but after fences shall have been in good faith constructed, such liability shall not extend to damages occasioned in part by contributory negligence, a right of action, accruing through a fence erected some years previously having been recently destroyed or injured by fire, is governed by the latter provision of the statute, and not by that applicable to cases where fences have never been erected.

Same—Contributory Negligence—Right to Rebuild or Repair at Company's Expense.—Plaintiff who had no other pasture, turned a colt upon his lot after the fence had been destroyed by fire and before it had been reconstructed. *Held*, that he was guilty of contributory negligence in so doing, when by statute he had the right to rebuild or repair the fence at the expense of the railroad company.

APPEAL from Circuit Court, Portage County.

Action by Jesse A. Martin against John A. Stewart and Edwin H. Abbot, as trustees of the Wisconsin Central Railroad, to recover the value of a colt belonging to the plaintiff, which was killed by a passing locomotive on the track of the railway operated by the defendants by reason of their alleged negligence in failing to keep in repair and maintain a fence along their right of way contiguous to the plaintiff's land. There is no general verdict in the case, but the jury found specially that the colt escaped from the plaintiff's pasture, and went therefrom upon the defendants' right of way; that the fence between such pasture and right of way was destroyed August 15, 1886; that the plaintiff turned his colt into the pasture September 2, 1886, knowing at the time that such fence had been so destroyed, and had not been replaced, and kept the colt there until it was killed; that on said September 2d he talked with defendant's section foreman about repairing the fence, and the latter promised to repair it before September 10, 1886, but did not do so;

that the colt was killed September 10, 1886, in the manner above stated, nearly opposite the defective fence; that the plaintiff had no other pasture for the colt; and that the value of the animal when killed was \$120. There was no finding on the question whether or not the plaintiff was guilty of negligence contributing to the death of the colt. The defendants moved, at the proper times, for a nonsuit, for judgment on the special verdict, and for a new trial, all of which motions were denied by the court, and judgment for the plaintiff for \$120 and costs was ordered and duly entered. The defendants appeal from the judgment.

D. S. Wegg, Howard Morris, and J. G. Flanders for appellants.

Lamoureux & Park for respondent.

LYON, J.—The learned counsel for the plaintiff submitted an ingenious argument to sustain the proposition that the liability of the defendants for the value of the colt killed upon their railway track by their locomotive was absolute, and that the question of the contributory negligence of the plaintiff is not in the case. We think this proposition is inaccurate.

Section 1810, Rev. St., as amended by chapter 193, Laws 1881, after charging railway companies with

Statutory provisions.

the duty of constructing fences and cattle-guards, provides that, "until such fences and cattle-guards shall be duly made, every railroad corporation owning or operating any such road shall be liable for all damages done to cattle, horses, or other domestic animals, or persons thereon, occasioned in any manner, in whole or in part, by the want of such fences or cattle-guards; but after such fences and cattle-guards shall have been in good faith constructed, such liability shall not extend to damages occasioned in part by contributory negligence, nor to defects existing without negligence on the part of the corporation or its agents." This statute is plain and unambiguous, and admits of but one construction.

Until fences are erected along the right of way, pursuant to the statute, the liability

Statute construed.

of the persons or company operating the railway for injuries occasioned in whole or in part by the want of such fences, is absolute; but after such fences are once in good faith constructed, although thereafter they are destroyed, or become defective, an action for an injury alleged to be caused thereby will be defeated if it appear that the plaintiff was himself guilty of negligence which directly contributed to the injury. In the present case the right of way where the accident happened had once been fenced, and remained so fenced for several years, but the fence had been recently destroyed or injured by fire. Although the defendants were in default for not restoring it as

soon as they should have done, there is no proof or claim that they did not intend to do so, or of any bad faith on their part. Hence the case comes within the latter clause of section 1810, which, in effect, prohibits a recovery if the negligence of the plaintiff contributed to the injury complained of. Such is the doctrine of the cases in this court cited by counsel for the plaintiff. These are *Jones v. Sheboygan & F. R. Co.*, 42 Wis. 306; *Lawrence v. Milwaukee, L. S. & W. R. Co.*, *Ib.* 322; *Richardson v. Chicago & N. W. R. Co.*, 56 Wis. 347, 13 Am. & Eng. R. Cas. 654, and *Carey v. Chicago, M. & St. P. R. Co.*, 61 Wis. 71. The complaint herein was framed in this view, for it alleges that

Contributory negligence.

“without the fault or negligence of the said plaintiff, but solely from the fault and negligence of said defendants, their employes and servants, by reason of their failure to properly repair and maintain their fence aforesaid,” the colt escaped upon the right of way and was killed. Although there is no direct finding upon the question, we do not hesitate to hold that the special verdict establishes conclusively that the plaintiff was guilty of negligence which contributed directly to the injury of which he complains. He turned his colt into the pasture knowing that there was nothing to prevent it from going upon the railway track, and it does not appear that he used the slightest precaution to prevent the animal from so doing. Under the cases above cited, and many others decided by this court, this makes a perfectly clear case of contributory negligence on the part of the plaintiff, and defeats a recovery in the action. It is of no importance that the plaintiff had no other pasturage for his colt. This fact could not excuse his neglect, in the known presence of imminent danger to the animal, to use proper precautions to save it from injury. Moreover, the statute (section 1812) gives the plaintiff the right, upon proper notice, to rebuild or repair the fence (if the defendants fail to do so) at the expense of the defendants. The evidence being conclusive that the plaintiff was guilty of negligence which contributed directly to the killing of his colt, the motion for a nonsuit should have been granted. But, that motion having been denied, the defendants' motion for judgment upon the special verdict should have been granted. The judgment of the circuit court is reversed, and the cause will be remanded, with directions to that court to render judgment for the defendants upon the special verdict.

Turning Animals into Field with Knowledge of Defective Fence as Contributory Negligence.—See *Evans v. St. Paul, etc., R. Co.*, 13 Am. & Eng. R. Cas. 653; *Cleveland, etc., R. Co. v. Scudder*, 13 *Ib.* 561, note 563; *Pittsburgh, etc., R. Co. v. Smith*, 13 *Ib.* 579; *Cressly v. Northern R. Co.*, 15 *Ib.* 540; *Donovan v. Hannibal, etc., R. Co.*, 26 *Ib.* 588; *Union Pac. R. Co. v. Schwenck*, 13 *Ib.* 653; *Carey v. Chicago, etc., R. Co.*, 20 *Ib.* 469; *Alabama, etc., R. Co. v. Jones*, 15 *Ib.* 549.

MOODY

v.

MINNEAPOLIS AND ST. LOUIS R. CO.

(Iowa Supreme Court, January 25, 1889.)

Stock-killing—Contributory Negligence—Wilful Act of Plaintiff.—In an action for damages for killing stock where it appears that plaintiff knew that his animal had gone upon the track, and he had the opportunity and power to prevent the injury to it, but wilfully refused to do so, he cannot recover damages therefor under section 1289, Iowa Code, which provides that railway companies who fail to fence their track against live stock running at large at points where such right to fence exists, "shall be liable to the owner of such stock injured or killed by reason of the want of such fence for the value of the property or damage caused, unless the same was occasioned by the wilful acts of the owner or his agents."

APPEAL from District Court, Boone County.

Action against the Minneapolis & St. Louis R. Co. to recover double damages for the death of a cow killed by defendant in the operation of its railway at a point where it had the right to fence its track. Defendant appeals from a judgment for the plaintiff.

Albert E. Clarke for appellant.

Robert A. Lowry for appellee.

REED, C.J.—The cause came into this court on the following certificate of the trial jury: "Plaintiff's cow, being at large in the vicinity of defendant's unfenced track, strayed upon the track. Defendant's employees rang the bell, sounded the whistle, applied the brakes, and did all in their power to stop the train, but failed to stop the train before it struck the cow. Plaintiff, being present, and having the ability to prevent the accident by driving the cow from the track, and having ample time to do so (speed having been reduced to about two miles per hour), wilfully neglected and refused to take any steps or to do any act to drive said cow from the track, and wilfully permitted the cow to remain on defendant's track, in front of the engine, and to be run down thereby, and said cow was run down and killed, without fault or negligence on part of defendant's employees in charge of the train. First Question. Was the plaintiff's loss due to his wilful act, within the meaning of section 1289 of the Code, which prevents recovery when the loss is occasioned by the wilful act of the owner of stock killed? Second Question. Does section

1289 operate to make a railroad company absolutely liable for the value of stock killed by reason of the want of a fence in cases where the owner had the power to prevent the injury but wilfully refused to exercise such power?"

That portion of section 1289 necessary to be considered in determining the questions certified is as follows: "Any corporation operating a railway that fails to fence the same against live-stock running at large at all points where such right to fence exists, shall be liable to the owner of any such stock injured or killed by reason of the want of such fence for the value of the property or damage caused, *unless the same was occasioned by the wilful act of the owner or his agent.*" Many causes arising under this provision have been adjudicated in this court. In *Krebs v. Minneapolis & St. L. R. Co.*, 64 Iowa, 670, 20 Am. & Eng. R. Cas. 478, a construction was given to the clause printed above in italics. It was held that the language of the provision implies something more than mere negligence on the part of the owner of the stock, and that to defeat a recovery he must have been guilty of some act immediately connected with the injury; such as driving the stock upon the track, or the like. Merely permitting it to run at large in violation of a police regulation, or pasturing it upon lands adjoining the unfenced track with knowledge of the danger to which it would be exposed, does not have that effect. But in the present case plaintiff knew that his animal had gone upon the track, and had the opportunity and power to prevent the injury, but wilfully refused to exercise that power. He knew of the efforts made by the trainmen to prevent the collision, but wilfully refused to do anything to aid them, although he had the ability to prevent it. His act, it appears to us, should be regarded as a wilful act, "connected with the injury," and contributing to it. It does not differ in degree merely from the act of grazing his stock upon lands adjoining the unfenced track, but it is of a different quality. It was not an act of negligence merely, but was a positive wrong. The statute was intended for the protection of the persons and property carried upon railways from the dangers incident to collisions with stock upon the track, as well as to afford the owners of animals killed or damaged thereby a remedy for the injury. The act of standing by and wilfully refusing to make any effort to prevent such an injury, when by reasonable effort, within the power of the party to make, it might have been prevented, when the possible consequence of the collision to life and property are considered, is bad in morals, and it ought in law to defeat all right of recovery in the party who commits it. It has often been held by this court that a party cannot recover for an injury

Statutory provisions.

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caused by the negligence or wrong of another, if by the exercise of reasonable care on his part he might have avoided it. *Raridon v. Central Iowa R. Co.*, 65 Iowa, 640; 19 Am. & Eng. R. Cas. 615; 1b. 69 Iowa, 527. The rule, as applicable to an injury to stock occasioned by the want of a fence, is modified to some extent, doubtless, by the statute. But there is nothing either in the language of the statute or the nature of the case requiring the courts to hold that it does not apply to the state of facts set out in the certificate. We are of the opinion, therefore, that the first question should be answered in the affirmative; and upon the facts disclosed in the certificate the second should be answered in the negative. **Reversed.**

Owner Wilfully Exposing Animals Cannot Recover.—*Welty v. Indianapolis, etc., R. Co.*, 24 Am. & Eng. R. Cas. 371; *Missouri Pac. R. Co. v. Roads*, 23 Ib. 165, and see *Lee v. Minneapolis, etc., R. Co.*, 20 Ib. 476.

UNION PACIFIC R. CO.

v.

DE BUSK.

(*Colorado Supreme Court, March 1, 1889.*)

Effect of Appearance—Waiver of Objections.—Where a railroad company, the defendant in an action, attempted first by motion and then by plea to quash the return of the writ, and subsequently filed an answer on the merits of the case, it waived an objection to the summons and return and to the jurisdiction of the court, under the Colo. Code, 1877, §§ 46 and 396, which provide that from the time of service the court is deemed to have acquired jurisdiction, that a voluntary appearance shall be equivalent to a personal service, and that the defendant shall be deemed to appear when he answers or gives plaintiff a written notice of appearance.

Fire—Evidence to Prove Cause.—When witnesses testify that a fire sprang up immediately upon the passing of one of defendant company's trains, and that there was no fire on the premises before and no other apparent cause for the fire, the evidence is sufficient to warrant a finding that the fire was caused by the passing train.

Same—Constitutionality of Statute.—Section 2798, Colo. Gen. Stat., which enacts "that every railroad corporation operating its line of road or any part thereof in this state shall be liable for all damages by fire that is set out or caused by operating any such line of road or any part thereof," is not unconstitutional.

APPEAL from Jefferson County Circuit Court.

This was an action instituted by appellee (plaintiff below) against appellant (defendant below), to recover the value of a

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quantity of hay, of which plaintiff claimed to be the owner, and which was alleged to have been set on fire and burned by the operation of defendant's locomotive and cars through the premises where said hay was being put up; the fire being communicated from the locomotive to the growing grass, and thence to the hay. The defendant moved to quash the service of the summons on the ground that one Armor, upon whom the same was served, was not an agent of defendant upon whom service could be legally made, supporting said motion by affidavit. This motion was denied. The defendant then filed a plea in abatement, praying that the summons and return thereon be quashed, for the same reasons, substantially, as set forth in the motion. Upon this plea issue was joined and trial had, the court finding in favor of plaintiff and holding the service sufficient. The defendant then filed its answer to the merits, denying specifically several allegations of fact in said complaint, denying that the grass or hay of the plaintiff was consumed, and denying all damages; also specifically alleging that the injury or damage was not caused in any way or manner by the default or negligence of the defendant. Upon plaintiff's motion the court struck out of the answer all those parts which alleged that plaintiff had not been injured or damaged in any way or manner through the default or negligence of the defendant, on the ground that the same was irrelevant, redundant, immaterial, and insufficient. The case was then tried upon its merits. At the close of plaintiff's testimony the defendant moved for nonsuit on the grounds that the court had not acquired jurisdiction; that the complaint did not state a cause of action; and that there was no evidence connecting the defendant with the fire. This motion was denied. No further evidence being offered, the court, at the request of plaintiff, instructed the jury to the effect that, if they believed from the evidence that plaintiff was the owner of the hay, and that the same was consumed or injured by fire caused by sparks escaping from defendant's locomotive, as charged in the complaint, then the defendant was liable, and that the jury should assess his damages at the value of the hay consumed. The defendant requested the court to instruct the jury that they should find a verdict in favor of defendant unless they believed from the evidence that the fire testified to occurred through the default or negligence of defendant. The court refused to give this instruction. The plaintiff had a verdict. Defendant's motion for a new trial was overruled, and judgment was entered. The defendant brings this appeal, and assigns for error the several rulings of the court as above stated.

Teller & Orahood and E. R. French for appellant.
J. W. Horner for appellee.

ELLIOTT, J.—The early decisions in this state have been uniform to the effect that by a general voluntary appearance all objections to the summons and return thereof, and to the jurisdiction of the court over the person of the defendant, are waived; and that the filing of a demurrer or answer to the complaint constitutes such an appearance. . Jones v. Stevens, 1 Colo. 67; Creighton v. Kerr, Ib. 509; Wyatt v. Freeman, 4 Colo. 14; Smith v. District Court, Ib. 235. The Code of 1877 contains the following provisions, which have remained unchanged since that date: "Sec. 46. From the time of the service of the summons in a civil action the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings. A voluntary appearance of a defendant shall be equivalent to personal service of the summons, upon him." "Sec. 396. A defendant shall be deemed to appear in an action when he answers, demurs, or gives the plaintiff a written notice of his appearance." In the face of these plain, unqualified provisions the dearth of recent Colorado authorities upon the subject may be readily accounted for.

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Effect—
Waiver of ob-
jections.

The decisions in Western Union Tel. Co. v. Conant, 11 Colo. 111, in no way militates against the foregoing views. In that case the defendant "appeared specially," and moved to quash on the ground that the summons was not served upon the proper agent. The motion being denied, the defendant "made no further appearance," but proceeded by *certiorari* to reverse the judgment for want of jurisdiction. There was no general appearance. The merits of the case were not contested in the court below. The case of Lyman v. Milton, 44 Cal. 630, if in conflict with the foregoing, cannot be accepted as authority. In that case it seems the court refused to permit a special appearance on behalf of an infant for the purpose of moving to quash a defective summons. There was no such refusal in this case. On the contrary, the defendant was permitted to attempt—first by motion, and then by plea—to quash the return of the writ.

The evidence was sufficient to warrant the inference that the fire was caused by the defendant's passing train, as alleged in the complaint; several witnesses testifying, in substance, to the springing up of the fire immediately upon the passing of the train, and that there was no fire on the premises before, and no other apparent cause for the fire. From the nature and circumstances of such cases considerable latitude must be allowed in the introduction of testimony, and in the drawing of inferences as to the origin of the fire. 1 Thomp. Neg. 159; Union Pac. R. Co. v. Jones, 9 Colo. 379; Butcher v. Vaca Valley R. Co. (Cal.), 23 Am. & Eng. R. Cas. 356.

Evidence to
show origin of
fire.

By the ancient common law it was held that a person in whose

house a fire originated, which afterwards spread to his neighbor's property and destroyed it, was forced to make good the loss, whether the person in whose house the fire originated was negligent in respect to the fire or not; and subsequently it was held that such person would be responsible for fire in his field as well as in his house, on the ground that a person who makes a fire must see that it does no harm, and must answer the damage if it does any. *Sic utere tuo, ut alienum non lædas*. As late as 1858, in the English court of exchequer, Bramwell, B., used the following language to the jury: "If, to serve his own purposes, a man does a dangerous thing, whether he take precautions or not, and mischief ensues, he must bear the consequences; that running engines which cast forth sparks is a thing intrinsically dangerous; and that if a railway engine is used which, in spite of the utmost care and skill on the part of the company and their servants, is dangerous, the owners must pay for any damage occasioned thereby." But in 1860 it was held, on an appeal of the case to the exchequer chamber, reversing the court of exchequer, that a railway company authorized by the legislature to use locomotive engines is not responsible for damage by fire occasioned by sparks emitted therefrom, provided it has taken every precaution in its power, and adopted every means which science can suggest, to prevent injury from fire, and is not guilty of negligence in the management of the engine. *Vaughan v. Taff Vale R. Co.*, 5 Hurl. & N. 678; see 1 Thomp. Neg. 122 *et seq.*, and notes.

Colorado having adopted the common law of England so far as applicable, etc., and the acts of the British parliament in aid thereof, etc., as they existed prior to the fourth year of James I. (Laws 1861, p. 35), it would seem as a first impression that our statute making railway companies unconditionally responsible for their fires is not a change of the law, but declaratory merely. But for some reason, perhaps because the common law in reference to the liability for damages caused by accidental fires was not considered applicable to our condition as a new country, the uniform current of decisions in America has been, in the absence of statute, to the effect that negligence or misconduct is the gist of the liability of railroad companies for injuries caused by fire escaping from their engines; though the authorities are in hopeless conflict as to which party must assume the burden of proof in such cases. Generally the burden of proving negligence rests upon the party alleging it. Hence the rule is held in many states that the plaintiff must offer some proof tending to show negligence on the part of the railroad company, and that the destruction of property by fire does not of itself raise a presumption of negligence. It is said the plaintiff must go further,

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ment.

and prove some positive act of negligence, or at least something from which it may be inferred—as the defective construction of the engine, the unusual size of the sparks, the improper velocity of the train, or the like. On the other hand, in nearly if not quite as many states the rule is held that, the origin of the fire being proved against the railroad company, the burden devolves upon the company to show that it has used all necessary precautions to avoid doing such mischief. The reasoning in support of the latter rule may be stated thus: Since the railroad company is not to be held responsible for damages occasioned by fire from its engines, provided it has not been guilty of negligence in the management of its engine, and has taken every precaution in its power, and adopted every means which science can suggest, to prevent injury from fire, therefore it must prove these affirmative acts of diligence in order to bring itself within the terms of the proviso. It is said with great force that this does not require the company to prove a negative, nor is it an unreasonable burden, since the company is presumably possessed of the necessary information in regard to the construction and working of its engines, and can readily show, if such be the fact, that it has employed careful and competent servants, and that it has used the most improved appliances to prevent the escape of fire from its engines; while a party litigating against a railroad company can hardly be expected to have the means of showing whether, in the construction of the engine, or in the use of it at the time of the injury, the company was or was not guilty of negligence. *Shear. & R. Neg.* § 333; 1 *Thomp. Neg.* 153; *Philadelphia & R. R. Co. v. Schultz*, 2 *Am. & Eng. R. Cas.* 271.

From the multitude of decisions in cases of this kind it appears that the courts have been extremely liberal in allowing a recovery in favor of the party suffering damage caused by fire from passing trains. Even in cases where the proof of negligence is cast upon the plaintiff, slight circumstances have been held sufficient to sustain the burden. The origin of the fire has generally been held sufficiently established by inferences drawn from slight circumstantial evidence. Recoveries have been allowed where the damages have resulted from fires indirectly communicated; and, as a general rule, the courts have refused to restrict the recovery to those cases where the fire has been communicated directly from the engine to the property injured. *Hart v. Western R. Co.*, 13 *Metc. (Mass.)* 99; *Pratt v. Atlantic & St. L. R. Co.*, 42 *Me.* 579; *Lyman v. Boston & W. R. Co.*, 4 *Cush. (Mass.)* 288; *Pierce v. Worcester & N. R. Co.*, 105 *Mass.* 199. In this condition of the law, as announced by the decisions of the courts, it is not surprising that some of the states have sought by legisla-

Liberality of
courts in al-
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tion to further regulate the liability of railroad companies for damages resulting from fires caused by the operation of their trains. In 1874 our territorial legislature enacted the following:

Statutory provisions. "That every railroad corporation operating its line of road, or any part thereof, in this state, shall be liable for all damages by fire that is set out or caused by operating any such line of road, or any part thereof, and such damages may be recovered by the party damaged by the proper action in any court of competent jurisdiction." Gen. St. Colo., p. 812, § 2798. Various objections have been urged against the constitutionality of acts of this kind. For example, it has been claimed (1) that they are the means of depriving a railroad company of its property "without due process of law;" (2) that they deny to railroad corporations "the equal protection of the laws;" (3) that they are acts "impairing the obligations of contracts;" (4) that they interfere with the powers of congress to "regulate commerce among the several states."

Let us consider the reasoning of some of the principal authorities relied upon as denying, as well as those asserting, the constitutionality of such acts. The legislature of Alabama passed an act providing that railroad companies in that state should be liable for all damages to live-stock or cattle of any kind caused by their locomotive or railroad cars. The supreme court of that state expresses its

Constitutionality of Alabama act.

opinion in respect to said act as follows: "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense, to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law. . . . It is within the power of legislation to declare that certain proofs shall be *prima facie* evidence of specified facts. But at the same time we decided that the legislature could not constitutionally ordain that such proofs should be conclusive evidence of material facts in controversy. The first is a mere rule of evidence. The last has been characterized as 'a confiscation of property.' . . . The statute under discussion dispenses with all proof of the most material element of the wrong it seeks to redress. It declares that the railroad corporation shall make reparation for an injury inflicted in the authorized prosecution of its lawful business, without a semblance of fault, negligence, or want of skill in its employees,—an injury which no human prudence or foresight could prevent; and yet the statute will not allow the railroad to exculpate itself by proof of the highest qualifications and most watchful vigilance.

This falls short of due process of law." *Zeigler v. South & North Ala. R. Co.*, 58 Ala. 599. The opinion of the Alabama court above referred to, though not based upon a statute relating to damages by fire, is nevertheless an authority bearing legitimately upon the question under consideration. Upon careful examination, however, we cannot follow it. We think the language altogether too broad and sweeping. Such reasoning would compel us to declare certain sections of the statute of frauds, as well as other conclusive presumptions of law, unconstitutional.

"It is a principle of the common law," says the Iowa supreme court in an opinion hereinafter cited, "that the owner of vicious domestic animals shall not be liable for the injuries they inflict, until he has had knowledge of their vicious propensities, and neglects to restrain them. Yet it would scarcely be claimed that an act of the legislature making the owner liable for such injuries, without such knowledge, would be unconstitutional. That would be a case in which one of two equally innocent persons must suffer, and it certainly would be as competent for the legislature to declare that the loss shall be borne by the owner of the animal as it now is for the common law to visit the loss on the person injured." Iowa act.

The constitution of California provides, in substance, that the property of all persons, except railroad and other *quasi* public corporations, shall be assessed for taxation at the value thereof, less the amount of any mortgage incumbrance thereon, but that the franchise, roadway, road-bed, rails, California act. and rolling stock of all railroads operated in more than one county shall be assessed at their actual value, without deduction for any mortgages on the property. In an action to recover the taxes from a railroad corporation, it was held by the United States circuit court, *Field and Sawyer, JJ.*, that railroad corporations were persons within the meaning of the fourteenth amendment to the constitution of the United States, and that the foregoing provision of the constitution of California was in conflict with said amendment in that it deprived railroad corporations of "the equal protection of the laws," by imposing upon them unequal taxation. *County of San Mateo v. Southern Pac. R. Co. (Cal.)*, 8 Am. & Eng. R. Cas. 1. In determining the constitutionality of statutes it must be borne in mind that every act which has received the sanction of the general assembly is to be considered constitutional, unless the contrary appears beyond reasonable doubt. The precise point of conflict between the statute and the constitution—state or national—must appear plain, palpable, and inevitable, or else the act of the general assembly must be held to prevail. It is clear that the state of California, by the provisions of the constitution above referred

to, expressly discriminated in favor of private individuals, and against railroad corporations, in the matter of assessment and taxation, and thus attempted to deprive railroad corporations of "the equal protection of the laws" guaranteed by the constitution of the United States. There could be no doubt as to the meaning or effect of the California constitution as to that particular matter. But no discrimination was either expressed or intended in favor of private individuals, or against railroad corporations, by our statute making them liable for damages by fire caused by the operation of their trains. The object of the statute was to give an adequate remedy to those who should suffer damages from fire caused by the operation of locomotive engines by the dangerous agency of steam. The object of the act was not to punish railroad corporations, but was to declare upon whom the loss must fall in case damage by fire should ensue by the operations of railroads. In the act under consideration the legislature evidently used the words "railroad corporation" in their popular sense, as denoting any party engaged in the operation of railroads. It was a matter of common knowledge then, as it has been ever since, and is now, that railroads were operated only through the agency of corporations. Hence there was in fact no chance for discrimination—no chance to deprive any one of "the equal protection of the laws"—by declaring a liability against "railroad corporations" only, since they only were thus engaged in operating railroads.

We have seen that the word "persons" was held to be comprehensive enough to include corporations, and thus the constitution of California was declared to be in conflict with the constitution of the United States. In passing upon the constitutionality of this act of our territorial legislature, we think the words "railroad corporations" should be construed to mean any body, company, or association of persons, whether technically incorporated or not, engaged in the operation of railroads. We feel bound to go thus far in construing the language of the act—First, for the reason that such was obviously the meaning intended by the legislature; and, second, to avoid the necessity of declaring the act unconstitutional. Whenever a word or phrase of an act is used in more senses than one, that sense is always to be preferred which will sustain and give effect to the act, rather than the sense which would render that act unconstitutional and void.

The legislature of Michigan granted a charter to a plank-road company, subject to alteration, amendment, or repeal after 30 years, but not before, "unless it shall be made to appear to the legislature that there has been a violation by the company of some of the provisions of this act." In less than 30 years the

legislature passed an act, without preamble or recital, to repeal the charter. In a case brought to test the validity of the repealing act, Mr. Justice Cooley used the following language: "The charter of a private corporation is to be regarded as a contract, whose provisions are binding upon the state, and cannot be set aside at the will of the legislature. Such a charter is a law, but it is also something more than a law, in that it contains stipulations which are terms of compact between the state as the one party and the corporators as the other, which neither party is at liberty to disregard or repudiate, and which are as much removed from the modifying and controlling power of legislation as would be the contracts of private parties." The opinion of Judge Cooley, holding the repealing act unconstitutional, was not based upon the proposition that additional burdens or liabilities had been imposed upon the corporation by a subsequent statute, but the holding was that the determination of the question whether or not the company had violated its charter was a judicial and not a legislative act, and that the company had a right to a trial before its charter could be rightfully forfeited. *Flint & F. Plank-Road Co. v. Woodhull*, 25 Mich. 99. The same distinguished jurist and eminent author, in his work on Constitutional Limitations (pp. 710-712, 5th Ed.), says: "The occasions to consider the clause of the constitution of the United States which forbids the states passing any laws impairing the obligation of contracts have been frequent and varied; and it has been held without dissent that this clause does not so far remove from state control the rights and properties which depend for their existence or enforcement upon contracts, as to relieve them from the operation of such general regulations for the good government of the state and the protection of the rights of individuals as may be deemed important. . . . Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter-contract, removed from the sphere of state regulation, and that the charter implies an undertaking on the part of the state that in the same way in which their exercise is permissible at first, and under the regulations then existing, and those only, may the corporators continue to exercise their rights while the artificial existence continues. The obligation of the contract by no means extends so far; but, on the contrary, the rights and privileges which come into existence under it are placed upon the same footing with other legal rights and privileges of the citizen, and subject, in like manner, to proper rules for their due regulation, protection, and enjoyment."

The statute of New Hampshire is as follows: "The proprietor

of every railroad shall be liable for all damages which shall accrue to any person or property by fire or steam from any locomotive or other engine on such road." In an action brought upon this statute the objection was raised that it interfered with the power of congress to "regulate commerce among the several states." The question was elaborately presented in the briefs of counsel; but the supreme court, without discussing the question, held that the objection could not be maintained; that federal authority was against it; and rendered judgment sustaining the statute. *Smith v. Boston & M. R. Co.*, 63 N. H. 25. As this particular point has not been urged in the case at bar, we shall not further consider it in this opinion.

Maine and Massachusetts have statutes similar to our own, which have been upheld by a long line of decisions. Chief-justice Shaw, delivering the opinion of the court in *Hart v. Western R. Co.*, *supra*, used the following language: "We consider this to be a statute purely remedial, and not penal. Railroad companies acquire large profits by their business. But their business is of such a nature as necessarily to expose the property of others to danger; and yet, on account of the great accommodation and advantage to the public, companies are authorized by law to maintain them, dangerous though they are, and so they cannot be regarded as a nuisance. The manifest intent and design of this statute, we think, and its legal effect, are, upon the considerations stated, to afford some indemnity against this risk to those who are exposed to it, and to throw the responsibility upon those who are thus authorized to use a somewhat dangerous apparatus, and who realize a profit from it."

In 1873 the state of Iowa adopted a statute almost identical with our own. It provided "that any corporation operating a railway shall be liable for all damages by fire that is set out or caused by the operating of any such railway," etc. In an action brought thereunder the defence was made that the act was unconstitutional, as "impairing the obligations of contracts." Upon this defence the supreme court said: "Any legislation which deprives the defendant of the right to operate its road would clearly be an infraction of contract, and unconstitutional. But there is no implied contract between a state and a corporation that there shall be no change in the laws existing at the time of the incorporation which shall render the use of a franchise more burdensome or less lucrative, any more than there is between the state and an individual that the laws existing at the time of the acquisition of property shall remain perpetually in force. An individual may turn all his real estate into money, for the purpose of mak-

New Hampshire act,

Maine and Massachusetts acts.

Iowa act of 1873.

ing loans when the legal rate of interest is ten per cent, yet there can be no doubt that a legislature could afterwards reduce the legal rate to six per cent, thus materially lessening his profits and affecting the value of his property. And the same thing can be done with respect to a corporation. . . . It took its charter subject to the general laws, and, of course, subject to such changes as might be rightfully made in such laws. The legislature, surely, did not guaranty to the corporation that there should be no change in the laws. . . . It is true the generally received doctrine is that for a lawful and reasonably careful use of property the owner shall not be answerable in damages; but this is simply a principle of a common law. It is not so wrought into the idea of property, nor is it so hedged about by the constitution, that the legislature may not change it. . . . The statute simply recognizes the doctrine that the use of a locomotive engine is the employment of a dangerous force; that sometimes, notwithstanding the exercise of the highest care and diligence, it will emit sparks, and cause destructive conflagrations; that when this occurs loss must fall upon one of two innocent parties; that heretofore that loss has been borne by the owner of the property injured; hereafter it shall be borne by the owner of the property causing the injury." *Rodemacher v. Milwaukee & St. P. R. Co.*, 41 Iowa, 297.

We have thus noticed, at considerable length, some of the principal decisions bearing upon the question of the constitutional validity of statutes similar to our own. It will be observed that the decisions relied upon as denying the constitutionality of such acts relate to statutes upon subjects other than damages caused by fire. We are not aware that the supreme court of any state having an act like that of ours has declared the same unconstitutional. We come to the conclusion that such statutes are not penal, but purely remedial in their nature; that they apply to corporations which obtained their charters before, as well as since, their passage; that they should receive from the courts a reasonable and liberal interpretation and construction, such as will justly promote their object. By many courts the warrant for their enactment is ascribed to the police power of the state; but we have not found it necessary to attempt a particular classification in order to sustain their validity. Statutes practically identical with our own were passed, construed, and upheld by the decisions of several states for many years before ours was enacted; and we see no reason why Colorado should take the lead in declaring such acts unconstitutional. *Ross v. Boston & W. R. Co.*, 6 Allen (Mass.) 90; *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579; *Thorpe v. Rutland, etc., R. Co.*, 27 Vt. 140; *Denver & R. G. R. Co. v. Henderson*, 10 Colo. 1, 31 Am. & Eng. R. Cas. 559. Un-

Act held constitutional.

doubtedly the enforcement of such acts will stimulate railroad companies to the greatest diligence to prevent fires from the operation of their roads. If they are found to bear too severely upon railroad companies, the legislature may be relied upon to give relief by modification or repeal. A hundred years ago, when a man's house burned without any negligence on his part,—a case of pure accident,—and the fire caused the burning of his neighbor's house, it was deemed a harsh law that required him to make good his neighbor's loss, as well as to bear his own; and so resort was had to an act of parliament to remedy the supposed hardship. 14 Geo. III. c. 78. The adoption of the statute, in this and other states, making railroad companies liable for damages by fire caused by the operation of their locomotive engines, is but the re-enactment *pro tanto* of the ancient common law for the better protection of property exposed to such unusual dangers. Such matters are peculiarly within the control of the local legislatures; and such laws may be enacted, changed, or repealed to suit the varied conditions and circumstances of the people. Human laws, at best, are largely experimental, and especially in all free states we may expect frequent changes as the wants and necessities of the people may require, or as their experience and judgment may suggest. The judgment of the district court is affirmed. Judgment affirmed.

HELM, C.J.—I concur in the conclusion that the statute under consideration is not obnoxious to the constitutional objections presented, and that therefore the judgment should be affirmed.

Constitutionality of Statutes Imposing Liability for Fires.—See *Grissell v. Housatonic R. Co.*, 32 Am. & Eng. R. Cas. 344.

In upholding the validity of the Kansas act (Chap. 155, Laws 1885), providing that the occurrence of a fire caused by the operation of a railroad is *prima facie* evidence of negligence on the part of the railroad company, the supreme court of that state say: "The validity of the statute mentioned is assailed upon several grounds, one of which is that the subject-matter of section 1 is not clearly expressed in the title of the act. The title is 'An act relating to the liability of railroads for damages by fire.' The first section of the act simply provides that, when the fact is established that the fire and resulting damages were caused by the operation of the railroad, it shall be *prima facie* evidence of negligence on the part of the railroad company; and, further, that in an action for damages the contributory negligence of the plaintiff shall be considered in determining his right of recovery. The section establishes a rule for fixing the liability of a railroad company for damages by fire, and no argument is required to show that the provisions of the section relate to such liability, or that they are covered by the broad terms of the title quoted. It is contended that the act is void because it is partial and discriminating in imposing a rule of procedure on railroad companies not applicable to others, and making the company liable for an attorney's fee in cases arising thereunder. Statutes making the occurrence of the fire presumptive evidence

of negligence on the part of the railroad company are not uncommon, and, indeed, many of the courts have established this rule without any statutory enactment, on the ground of necessity. *Brown v. Atlanta & C. Air Line R. Co.*, 13 Am. & Eng. R. Cas. 479, and numerous cases cited in appended note. Our legislature has placed the application of the rule beyond question by enacting it into a statute. There is no attempt to make railroad companies liable, in the absence of negligence; but it simply shifts the burden of proof upon the company when the fire is shown to have been caused by the operation of its road. The necessity of such a rule is very apparent. The locomotives, charged with fire, pass swiftly and frequently over the road, and are wholly within the control of the company, and the owner of property consumed by a fire communicated from such locomotives or trains has little opportunity to learn whether it was a case of accident or neglect, whether the machinery and appliances were in good condition, and that the servants in charge were at the time exercising due care. These facts may be easily ascertained by the company, and, if there is no want of care, it can without much difficulty rebut the presumption arising from the escape of the fire. The objection that this legislation is special and unequal cannot be sustained. The dangerous element employed, and the hazards to persons and property arising from the running of trains and the operation of railroads, justifies such a law; and the fact that all persons and corporations brought under its influence are subjected to the same duties and liabilities, under similar circumstances, disposes of the objections raised. The validity of such legislation has been set at rest by the recent decisions of the supreme court of the United States: *Barbier v. Connolly*, 113 U. S. 27, 7 Am. & Eng. Corp. Cas. 640; *Soon Hing v. Crowley*, 113 U. S. 703, 7 Am. & Eng. Corp. Cas. 646; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 22 Am. & Eng. R. Cas. 557; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 33 Am. & Eng. R. Cas. 390." *Missouri Pac. R. Co. v. Merrill*, 40 Kan. 404.

Fire—Evidence to show Cause of Fire.—Defective Engine.—In an action against a railroad company to recover damages for the destruction of property by fire alleged to have been set out by one of its locomotive engines, evidence that the fires broke out after the company's engine passed, where it was not shown that they could have happened in any other way, justifies the jury in finding that they were set by the engine. And in such case where the company's witness testified that an engine in good repair could not throw fire from the track to the place where the fire caught, the jury may infer that the engine was in bad repair. *Johnson v. Chicago & N. W. R. Co.*, Iowa, Sup. Ct., May 24, 1889.

Evidence to show Negligence in Setting out Fire.—In *Stertz v. Stewart* (Wis., April 29, 1889), 42 N. W. Rep. 214, it appeared that at the time and place of the fire one of the defendant's engines was passing at a speed of from 45 to 50 miles an hour, that it was an exceedingly dry time, and that sparks issuing from the engine kindled other fires along the track. Held, that a verdict that the fire on plaintiff's land was negligently set by one of defendant's engines was sufficiently supported by the evidence.

Defective Engine—Evidence as to Fires from other Engines.—In *Allard v. Chicago & N. W. R. Co.*, 40 N. W. Rep. 685, the Supreme Court of Wisconsin held that the fact that a railroad company's inspector has testified that so far as he knew the screen used on the engine alleged to have emitted the sparks was the same as used on all the engines on the road, does not entitle the plaintiff to show in rebuttal that fires frequently sprang up after the passage of other engines. The court said: "The reasons for such ruling have been so recently and so fully given by Mr. Justice Orton as to require no repetition here. *Gibbons v. Wisconsin V. R. Co.*, 58 Wis. 335, 13 Am. & Eng. R. Cas. 469. The mere proof that the

screen or netting in the smoke-stack of the engine in question was the same as on other engines did not open the door for the admission of evidence tending to prove that other engines, on other occasions, and under other circumstances, set such other fires. Especially is this so since the defendant did not prove, nor attempt to prove, that such screens or netting on such other locomotives did not emit sparks sufficient in size and quantity to set such fires."

Origin and Cause of Fire—Evidence.—In *Bernard v. Richmond, F. & P. R. Co.* (Va., Feb. 21, 1889), 8 S. E. Rep. 785, which was an action against a railroad company to recover damages for the destruction of property by fire alleged to have been set out by defendant's locomotives, defendant's experts testified that the engine which passed was new, of the best make and appliances, and that the spark-arrester was the best in use and in perfect order. According to several witnesses the fire did not start on defendant's right of way, and there was no combustible material thereon. These statements were not contradicted by plaintiff's witnesses who saw the fire. Some of the witnesses, including two of plaintiff's, testified that the fire started on adjoining land in a cluster of bushes. The court held that the plaintiff could not recover.

Evidence of Other Fires.—Evidence is admissible as to other fires originating from the locomotive engine of the defendant railway company, such evidence having a tendency to show lack of care on the part of the defendant; but evidence as to other fires which were not shown to have arisen soon after defendant's engine had passed, or to have resulted from the escape of fire from the engines of defendant, but were referred to as prairie fires generally in the vicinity of the railroad, is not admissible. *Missouri Pac. R. Co. v. Donaldson, Tex. Sup. Ct., Feb. 26, 1889.*

Presumption as to Cause of Fire—Defective Engine.—A train of the Canada Atlantic R. Co. passed the plaintiff's farm about 10.30 A.M., and another train passed about noon. Some time after the second train passed it was discovered that the timber and wood on plaintiff's land was on fire, which fire spread rapidly after being discovered, and destroyed a quantity of the standing wood timber on said land. In an action against the company it was shown that the engine which passed at 10.30 was in a defective state, and likely to throw dangerous sparks, while the other engine was in good repair and provided with all necessary appliances for protection against fire. The jury found, on questions submitted, that the fire came from the engine first passing, that it arose through negligence on the part of the company, and that such negligence consisted in running the engine when she was a bad fire-thrower and dangerous. *Held*, affirming the judgment of the court of appeal (32 Am. & Eng. R. Cas. 304), that there being sufficient evidence to justify the jury in finding that the engine which passed first was out of order, and it being admitted that the second engine was in good repair, the fair inference, in the absence of any evidence that the fire came from the latter, was that it came from the engine out of order, and the verdict should not be disturbed. *Canada Atl. R. Co. v. Moxley, 15 Sup. Ct. Canada, 145.*

Style of Smoke-stack.—Instructions.—In *Metzger v. Chicago, M. & St. P. R. Co.* (Iowa, Dec. 22, 1888), 41 N. W. Rep. 49, which was an action for setting out a fire by defendant's locomotive, it was held that the railroad company could not show the style of smoke-stack in use upon other roads after it had shown the kinds in common use, and the styles in use upon its own road, that being immaterial. It was also held in this case not to be erroneous for the court to refuse to charge that if no railroad had yet adopted and was using improved smoke-stacks exclusively, the defendant was not negligent in failing to adopt the improved stack. It was also held to be proper to refuse to charge that "so long as defendant might

reasonably use a single engine without the 'diamond stack,' negligence could not be predicated on the fact that the engine that started the fire was a 'diamond stack,' instead of a 'front-end extension,'" as it ignored the fact that in certain seasons and localities the "diamond stack" may be used without risk so far as fires were concerned.

Duty of Railroad Company to Adopt New Inventions.—In *Metzger v. Chicago, M. & St. P. R. Co.* (Iowa, Dec. 22, 1888), 41 N. W. Rep. 49, which was an action for setting out a fire by defendant's locomotive, it was held to be proper for the court to refuse to charge that the fact that a certain road was adopting an alleged improvement "is not such evidence as would show that the defendant is negligent because it has not adopted and placed the same on all its engines;" the court having already charged that "when an invention has been tested and generally approved as better than that already in use, it then becomes the duty of defendant with all reasonable diligence to adopt and use said invention upon its engines."

Cotton Stored on Platform to be Shipped.—Where a railroad company erects a platform for the purpose of shipping cotton, and its course of business is such that it induces parties to store cotton on it, under a promise to ship by the next freight train, and it passes and neglects to take on said cotton, and it is destroyed by fire by the company's passing train, after the freight train which ought to have taken it on has passed, the company is liable for the value of the cotton. *Meyer v. Vicksburg, etc., R. Co.* (La.) 6 So. Rep. 218.

Damages—Timber.—In estimating damage done to land burned over by a fire set out by a railroad company's locomotive engine, it is proper for the witnesses of the plaintiff to take into consideration timber standing on the land, and to state to the jury their opinion as to the value of such timber. *Stertz v. Stewart*, Wis. Sup. Ct., April 29, 1889.

Instruction as to Negligence Not Alleged in Complaint.—Where the petition in an action for setting out a fire does not allege that defendant was negligent as to the construction of the engine, an instruction that if the jury find "the fire was caused through the negligence of the defendant in the construction or management of the engine concerning the prevention of escaping coals and sparks, and without negligence of the plaintiff contributing to the loss, they should allow the plaintiff such damages," etc., is erroneous. *Miller v. Chicago, M. & St. P. R. Co.* (Iowa), 41 N. W. Rep. 28.

Pleading.—In an action against a railway company to recover damages resulting from fire which was negligently permitted to escape from a passing locomotive and train, the plaintiff should state in his petition as definitely as he can the train from which, and the time when, the fire escaped; but the failure of the court to require such definite statement, where no prejudice results to the defendant, is not reversible error. *Missouri Pac. R. Co. v. Merrill*, 40 Kan. 404.

PIKE

v.

GRAND TRUNK RAILWAY OF CANADA.

(U. S. Circuit Court, D. New Hampshire, May 15, 1889.)

Fire—Death—Proximate Cause.—In an action to recover damages for the death of plaintiff's intestate, where it appears that the intestate was not in danger by reason of the proximity of a fire, but that she voluntarily advanced towards it, going a distance of about 50 rods, and attempted to distinguish it, and it also appears that the intestate had no interest in the property which was on fire, the proximate cause of intestate's death was her voluntary act in attempting to extinguish the fire, and there can be no recovery.

AT LAW. On motion to direct a verdict for the defendant.

Action of tort to recover damages for negligently causing the death of plaintiff's intestate. Plaintiff's claim was made on the ground that a fire had been set out by a locomotive belonging to defendant on the land of one William W. Pike, that the house in which plaintiff's intestate lived with plaintiff's family stood upon that land, and that the intestate had reasonable cause to fear its destruction, and attempted to extinguish the fire. The place of the fire was distant 52 rods from the house. In attempting to extinguish it, the fire was communicated to intestate's clothing, and she received injuries from which she died shortly afterwards.

Ladd, Aldrich & Remick for plaintiff.

A. A. Strout and Ossian Ray for defendant.

COLT, J.—The motion made by the defendant, at the close of the testimony for the plaintiff, was left undecided, and the counsel for the plaintiff suggested at the time that the motion was made that it might be well to wait before passing upon it until the whole evidence was in, and, the question raised by the motion being somewhat complicated, I decided to allow the case to proceed. I have now reached the conclusion, after careful consideration, to direct a verdict for the defendant. The ground upon which I shall direct a verdict for the defendant is that, upon the uncontradicted evidence, it was the voluntary act of Mrs. Pike which was the proximate cause of her death. It being the established rule of law that the proximate, and not the remote, cause determines the question of liability, if upon the uncontra-

Proximate
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tary act.

dicted evidence the proximate cause was Mrs. Pike's voluntary act, then it is the duty of the court to direct a verdict for the defendant. If upon the question of proximate or remote cause the evidence is contradictory, or the question is in doubt, then it would be the duty of the court to submit the question to the jury.

It is undisputed that Mrs. Pike went out from her house of her own free will, and walked up the railroad track, to put out a fire from 30 to 40 rods distant, and that she met her death in the attempt. The rule of law is that a person is liable for all the consequences which flow in ordinary natural sequence from his negligence, or, according to another view, he is liable for all the consequences which could be foreseen as likely to occur; but he is not liable for the independent act of an intelligent stranger, because that would not follow as an ordinary natural sequence from his negligence, and such interference by a stranger could not be foreseen. The spontaneous action of an independent will is said, therefore, to break the causal connection. This is in truth the intervention of a new force outside of the regular natural sequence of the primary cause, and which cannot be a subject of precalculation. It is elemental law, therefore, that when such new, independent, and intelligent force intervenes, it breaks the train of causation, and it becomes the proximate cause, and the original act of negligence the remote cause. The statement of the principle is easier than its application. Each case must be governed by its own facts and circumstances, but, if the case comes clearly within the rule, the court should not hesitate to enforce it.

We have stated the rule, and have said that in our opinion Mrs. Pike comes within its general terms, but does not her case come under some of the exceptions or limitations to the rule which have been recognized by the courts? The intervening cause is not the proximate cause, unless the person acted of his own free will. The first cause does not cease to be the proximate cause if such intervening stranger is imbecile, or acts under compulsion, or under a sense of imminent peril; or, in other words, under such circumstances, produced by the first cause, as would give no opportunity for the exercise of free volition on the part of such stranger. Now, to my mind, there is no evidence going to prove that Mrs. Pike's act was not a strictly voluntary one. There is no evidence going to prove that her act was one of compulsion, or that she acted under the fear of imminent peril to herself, or that the circumstances were such as to destroy her power of volition. Each case must be controlled by its own circumstances. Upon the evidence it cannot be doubted that Mrs. Pike had every opportunity to escape. Neither the direction of the wind, nor the

**Plaintiff's
act purely
voluntary.**

proximity of the fire, nor the dryness of the season, upon the plaintiff's own evidence, placed the intestate in peril for the time being. Instead of escaping from the danger, whatever it was, she voluntarily advanced towards it, going a distance of about 50 rods towards and into the place where the fire was burning. Her act may have been praiseworthy, but it was not the less voluntary, and it does not relieve her from the consequences which ensued. Mrs. Pike had no legal or equitable interest in this property, and consequently in this action her administrator cannot invoke the principle that it was her duty to approach the fire, and endeavor to put it out. Even in a supposed action brought by the owner of the property against the railroad company, for damage caused by fire, the failure of this lady, 72 years of age, though she was active and strong for her age, to voluntarily endeavor to put out a fire 30 or 40 rods distant from the dwelling, could hardly be urged as contributory negligence on the part of the owner of the property. In the present case, I can see nothing in the situation of Mrs. Pike towards the property which was on fire which called for the action she took.

The plaintiff's counsel in their argument have cited *Page v. Bucksport*, 64 Me. 51; *Stickney v. Maidstone*, 30 Vt. 738,—as supporting a right of recovery under the facts disclosed in this case. But these cases do not meet the present one. There the plaintiff was in duty bound to act as he did; besides, his act grew immediately out of and was a part of the original act of negligence. The plaintiff in those cases was acting under the immediate force of the first cause. What took place was but a single happening or event, which was directly and immediately occasioned by the first cause. There was no such element present, as in this case, of a party voluntarily and deliberately putting herself in a dangerous position, which did not result directly and immediately from the first cause. The plaintiff also relies upon *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, but that case distinctly recognizes the doctrine of proximate cause, which the leading cases in this country and England have established. Mr. Justice Strong in that opinion says:

"We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or non-feasance. They are not when there is sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was

**Authorities
examined.**

any intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury."

I cannot hold that the Kellog Case is an authority to the position taken by the plaintiff that the question of remote or proximate cause must, under all circumstances, be submitted to a jury for decision. If upon the facts presented there is any question as to what was the proximate cause, then the case should go to the jury; but if the undisputed facts show, under well-established rules of law, what the proximate cause is, then manifestly the court should act accordingly. This position is recognized in the latter case of *Scheffer v. Washington City & V. M. R. Co.*, 105 U. S. 249, 8 Am. & Eng. Cas. 59, when the supreme court held, as a matter of law, that the proximate cause of the suicide or death of the intestate was insanity, and that it was not due to the negligence of the company, whereby he suffered an injury eight months before. In the time allowed me I have given such consideration as I was able to this motion. It has been my effort to discover, if possible, some question which could fairly be submitted to the jury in this case. The court should be clearly satisfied before granting a motion of this character, but, if so satisfied, it becomes just as clearly the duty of the court not to hesitate in granting it. In revolving in my mind what charge to give to the jury, I did not see, under the evidence and the law, how I could frame one which would not substantially direct them to bring in a verdict for the defendant; and in the light I now have I do not see how, if the jury should find for the plaintiff, I could hesitate in setting the verdict aside on motion of the defendant. Such being the situation of the case, and such my views, I feel it my duty now, upon the close of the whole evidence, to direct the jury to return a verdict for the defendant.

Fire—Liability for Loss of Life.—If, through the negligence of a railroad company, sparks and cinders alive with fire escape from its engine and set fire to a house, the company is liable, not only for the property destroyed, but also for any loss of life occasioned thereby without any contributory negligence on the part of the party bringing the action. *Rajnowski v. Detroit, B. C. & A. R. Co.*, Mich. Sup. Ct., Feb. 8, 1889,

WEST

v.

CHICAGO AND NORTHWESTERN R. CO.

(Iowa Supreme Court, May 24, 1889.)

Fire—Iowa Code—Contributory Negligence.—Under section 1289, Iowa Code, a railroad company cannot escape liability for negligently setting out a fire on its right of way, whereby an adjoining owner sustains damage by showing that the plaintiff was guilty of contributory negligence in exposing his property.

ON petition for rehearing. For opinion on the original hearing, see 32 Am. & Eng. R. Cas. 339.

Hubbard, Clark & Dawley for appellant.

Piatt & Carr and *Charles E. Wheeler* for appellee.

BECK, J.—I. A hearing was granted in this case upon the petition of defendant. The question upon which we desired further argument is whether the rule of contributory negligence is applicable to cases wherein railroad companies are liable under the statutes for fires set out in the operation of their railroads. Upon the other questions in the case we had no doubt, and did not order the rehearing to gain more light upon them. We need not further discuss them. The foregoing opinion is criticised for the course of its argument, rather than assailed because of its conclusions. What is said as to the purpose of the statute "to settle a vexed question upon which the courts had been divided" may or may not be accurate. But it is very true that the statute was intended to prescribe a rule of law. Whether there had been contests as to the prior rules recognized by the courts will not determine the construction of the statute. The statute imposes an absolute liability upon railroad corporations, without regard to their negligence, or the contributory negligence of the person injured. This court has no right to interpolate words in the statute which limit that liability to cases wherein the injured person does not contribute to the injury by his own negligence. Surely, the language of the statute, without interpretation, will admit of no such construction. But it is said that this court has held in *Small v. Chicago, R. I. & P. R. Co.*, 50 Iowa, 338, that the railroad company is not liable, if it shows affirmatively that it was not guilty of negligence. It does not

Contributory
negligence not
a defence.

follow that because this court has gone so far it must go still further, and limit the liability on another ground, namely, the contributory negligence of the person injured. There is an obvious distinction between the limit fixed by *Small v. Chicago, R. I. & P. R. Co.* and the limit proposed in this case. In the first, it is a limit fixed by proof of want of negligence; in the other, it is a limit fixed by proof of contributory negligence. It may be well to hold that one who is not negligent should not be liable; but it is absurd to say that under this statute, fixing absolute liability, the fault of the railroad company being shown or being presumed, it is not liable because of the fault of the plaintiff. It will be seen that, as is said in the foregoing opinion, we are asked to take a step far in advance of *Small v. Chicago, R. I. & P. R. Co.*

It cannot be said that the doctrine of contributory negligence is founded upon the rule that one wrong-doer cannot recover of another engaged with him in the commission of the wrong for injuries resulting therefrom. It cannot be said that defendant and plaintiff, both being negligent, united in the commission of the wrong. The defendant's negligence was positive,—active. The plaintiff's was negative, and consisted in a failure to exercise due care to prevent injuries from defendant's negligence. The reasons demanding the rule recognized in *Small v. Chicago, R. I. & P. R. Co.* do not demand that the rule of contributory negligence be extended to this case. In our opinion, the cases cited by counsel for defendant do not support his contention that the doctrine of contributory negligence should be applied in this case. We adhere to the foregoing opinion. Affirmed.

Fires—Contributory Negligence as a Defence.—See *West v. Chicago & N. W. R. Co.*, 32 Am. & Eng. R. Cas. 339, note 342; *Pittsburgh, etc., R. Co. v. Hixon*, 32 Ib. 374; *Missouri Pac. R. Co. v. Bartlett*, 32 Ib. 343, note 35 Am. & Eng. R. Cas. 245.

Same—Hay Stacks near Railroad.—The owners of land adjoining a railroad upon which hay is staked are not required to keep the grass burned off such land or the land between the stacks and the right of way. *Louisville, N. A. & C. R. Co. v. Hart*, Ind. Sup. Ct., June 5, 1889.

LOUISVILLE AND NASHVILLE R. CO.

v.

REESE.

(Alabama Supreme Court, January 9, 1889.)

Fire—Presumption of Negligence.—The fact that property was destroyed or damaged by fire having escaped from a passing engine is *prima facie* evidence of negligence in the construction or management of such engine.

APPEAL from Circuit Court, Butler County.

Action by Albert Reese against the Louisville & Nashville R. Co. for damages to property caused by a fire set out by one of defendant's locomotives. Defendant appeals from a judgment for the plaintiff.

Jones & Falkner for appellant.

J. C. Richardson and *John Gamble* for appellee.

CLOPTON, J.—On the trial of the action, which is brought by appellee to recover for injuries suffered by the escape of fire from an engine, the defendant requested the court to charge the jury that the burden of proof is upon plaintiff to show that the fire was caused by the negligence of defendant, and that evidence tending to show that it was caused by sparks from defendant's engine, without evidence tending to show that such escape of fire was the result of negligence on the part of defendant, is not sufficient to entitle plaintiff to recover. The defendant also requested the court to further instruct the jury that the negligence of defendant will not be presumed from the mere fact that the fire was caused by sparks escaping from defendant's engine.

On the question presented by these charges, the authorities are in manifest and decided conflict. Many of them—probably, the greater number—maintain the rule that an inference of negligence does not arise from the mere fact of fire being communicated by a passing locomotive, and that the *onus* is on the plaintiff to prove, in addition to the origin of the fire, some positive act of negligence on the part of defendant, or circumstances tending to show a want of due care. The following authorities may be cited as sustaining this doctrine: *Gandy v. Chicago & N. W. R. Co.*, 30 Iowa, 420; *Philadelphia & R. R. Co. v. Yerger*, 73 Pa. St. 121; *Indianapolis*

**Presumption
of negligence
—Authorities.**

& C. R. Co. *v.* Paramore, 31 Ind. 143; *McCaig v. Brie R. Co.*, 8 Hun (N. Y.), 599; 1 Whart. Ev. § 360, 13 Am. & Eng. R. Cas., note, 488.

The most cogent reasons given for the support of this rule are that a railroad company which is authorized by law to operate its trains by steam is not an insurer against accidents by fire, and is not liable for injuries caused by the use of fire in generating steam, if the right is exercised in a lawful manner, and with reasonable care and skill, and the owner of adjacent property assumes all risks incident to a lawful and proper use of the road; that negligence is the gist of the liability, without proof of which an action cannot be maintained, and, by the general rule in actions founded on negligence, the plaintiff must aver it, and the burden of proof rests upon him, and in no case does the mere fact of injury prove negligence.

The converse rule is that proof of the mere fact that property was destroyed or damaged by fire having escaped from a passing engine is *prima facie* evidence of negligence in the construction and management of such engine, and casts on the defendant the burden to rebut the presumption. The following authorities may be cited as sustaining this rule: *Burlington & C. R. Co. v. Westover*, 4 Neb. 268; *Karsen v. Milwaukee & St. P. R. Co.*, 29 Minn. 12, 7 Am. & Eng. R. Cas. 501; *Illinois Cent. R. Co. v. Mills*, 42 Ill. 407; *Coates v. Missouri, K. & T. R. Co.*, 61 Mo. 38; *Burke v. Louisville & C. R. Co.*, 7 Heisk. (Tenn.) 451; *Case v. Northern Cent. R. Co.*, 59 Barb. (N. Y.), 644; *Spaulding v. Chicago & N. W. R. Co.*, 30 Wis. 110; *Shear. & R. Neg.* § 333; 38 Amer. Dec. note, 71; 1 *Thomp. Neg.* 153.

These decisions base the rule mainly upon the necessity of the case. The argument is clearly and forcibly stated by Dixon, C.J., in *Spaulding v. Railway Co.*, *supra*. After observing that it is the duty of railroad companies to employ all due care and skill in the construction of their engines to prevent injury to the property of others by the escape of fire therefrom, he says: "The reasons given for requiring the companies to show that this duty has been performed on their part are that the agents and employees of the road know, or are at least bound to know, that the engine is properly equipped to prevent fire from escaping, and that they know whether any mechanical contrivances were employed for that purpose, and, if so, what was their character; whilst, on the other hand, persons not connected with the road, and who only see trains passing at a high rate of speed, have no such means of information, and the same is inaccessible to, and cannot be obtained by, them without great trouble and expense."

It is an exception to the general rule that a mere damage or

destruction by fire does not, of itself, authorize an inference of negligence. The soundness and justice of the exception in cases of fire caused by steam-engines may be rendered apparent by observing its qualification and operation. We do not understand that in actions for injuries caused by negligent escape of fire from a railroad engine it abrogates, or is intended to abrogate or modify, the general rule, which makes it incumbent on the plaintiff, in the first instance, to establish a *prima facie* case, or to devolve on the defendant the burden of doing more than disproving the *prima facie* case shown by the plaintiff. Railroad companies, being authorized to employ the powerful and dangerous agency of steam, are required by law to use due and reasonable care to prevent injury to the property of others; as has often been said, a high degree of care. Reasonable care, however, does not require the adoption of every new invention or contrivance which science may or can suggest, as to the utility of which men equally skilled may differ. They fulfil the measure of their duty, in this respect, by adopting such appliances and contrivances as are in practical use by well-regulated railroad companies, and which have been proved by experience to be adapted to the purpose. When they have discharged this duty, they are not liable for accidental injuries caused by the escape of fire from their engines.

The mere fact that a fire originated from sparks emitted from an engine is not sufficient to fasten the liability on the company. Neither does the rule so operate. It is not a rule of liability, but of evidence. Though no mechanical contrivance has been invented, or is in use, which can effectually prevent the escape of fire from locomotives, at all times and under all circumstances, from which injury may result, experience has demonstrated that fire rarely escapes in such quantity or volume as to cause damage when the engines are properly constructed, are supplied with the most improved appliances for preventing the escape of fire, and are managed with care.

On the advanced progress in mechanical appliances, and the practical demonstration of their utility and efficiency, a reasonable inference may arise, when fire originates from sparks emitted by a locomotive in sufficient quantity or volume to occasion damage, that the engine is not properly constructed, or that it has not the improved appliances, or is not managed with care. When the inference is repelled by proof of the proper construction of the engine, and the use of the proper appliances and careful management, the plaintiff cannot maintain the action without making proof of other negligence or want of care. The extent of the rule is that injury caused by fire escaping from an engine is a circum-

Establishment
of prima facie
case.

Inference of
defects in en-
gine.

stance from which the inference of negligence in construction and management of the engine may be reasonably drawn, but negligence in no other respect. It is the application of the general principle that presumptive evidence is founded on the connection which experience has demonstrated to exist between the facts proved and the fact intended to be proved. We think the rule that the destruction or damage of property by fire escaping from a railroad engine raises an inference of negligence, consisting in a defect in its construction or in the appliances used or want of due care in its management, a sound and just rule, and, as thus limited and qualified, will more effectually accomplish the protection of property and the ends of the law.

The same observations apply to all the charges requested by defendant. On the assumption that the fire originated from sparks emitted from the engine, they put on plaintiff the burden to show that the engine was not properly managed, or that the spark-arrester was not in good order, in view of the evidence that the spark-arrester used by defendant would last only from three to twelve months, and of the absence of proof that the particular engine had ever been inspected, and of the manner in which the engine was managed,—facts peculiarly within the knowledge of defendant, with the means and opportunity of proof.

Affirmed.

Presumption of Negligence Where Fire is Set by Locomotive.—See *Galveston, etc., R. Co. v. Horne*, 35 Am. & Eng. R. Cas. 238, note, 243; *Gulf, etc., R. Co. v. Benson*, 32 Ib. 330; *Tanner v. New York, etc., R. Co.*, 32 Ib. 380; *Maxley v. Canada Atl. R. Co.*, 32 Ib. 304; *Pittsburgh, etc., R. Co. v. Hixon*, 32 Ib. 374; *Bowen v. Minnesota, etc., R. Co.*, 32 Ib. 370; *Chicago, etc., R. Co. v. Ostrander*, 32 Ib. 361; *Tilley v. St. Louis, etc., R. Co.*, 32 Ib. 324, note, 328, where all the authorities are collected.

In *Meyer v. Vicksburg, etc., R. Co.*, 6 So. Rep. 218, the supreme court of Louisiana hold that when a railroad company equips the engines with the most effective modern and practical appliances to prevent the escape of fire, the burden of proof is on the party alleging damage by fire from the escape of sparks; and, to render the company liable, the proof of negligence must be positive, strong, and convincing. And in *Edrington v. Louisville, N. O. & T. R. Co.*, 6 So. Rep. 19, the same court *held*, that in an action for damages against a chartered railroad company, to hold it responsible for injury sustained in consequence of a fire alleged to have been occasioned by sparks emitted from one of its locomotives, the law requires the proof that the sparks so emitted were the cause of the ignition, and that to all probability the wrong is the result of the carelessness and negligence of the company in not using such proper scientific contrivances and appliances as must effectually arrest the emission of such sparks, and prevent consequent harm to property.

Evidence to Overcome Presumption.—In *Seska v. Chicago, M. & St. P. R. Co.* (decided by the supreme court of Iowa, Feb. 24, 1889), 41 N. W. Rep. 596, it is *held*, that when it is shown that the same engine set out other fires elsewhere at about the same time, the jury may well find that

the *prima facie* case raised by the statute is not overcome by evidence of care on defendant's part.

State Raising Presumption of Negligence—Pleading.—In *Seska v. Chicago, M. & St. P. R. Co.* (Iowa), 41 N. W. Rep. 596, it is *held*, that as the Iowa statute makes the fact that the fire was set out in the operation of a railroad, *prima facie* evidence of negligence, a petition alleging that fire was set out by a locomotive operated on defendant's road, but not stating that it was caused by negligence of defendant or its servants, is good on motion in arrest of judgment.

In *Atchison, etc., R. Co. v. Gibson* (Kan., June 7, 1889), 21 Pac. Rep. 788, it was *held*, that in actions against railroad companies for damages caused by fire, under section 101, § 84, Comp. Laws 1885, it is only necessary for the plaintiff to establish the fact that the fire complained of was caused by the operation of the road, and the amount of damages; and when it appeared from the evidence that, within a very few minutes after a train passed, the fire originated that caused the damages in two or three places close to the track, this evidence was sufficient to cast upon the railroad company the burden of showing that it was not the result of defective appliances, or of negligence of the employees of the company, that the fire escaped.

The rule prescribed by chapter 155 of the Kansas Laws of 1885, that the occurrence of a fire caused by the operation of a railroad is *prima facie* evidence of negligence on the part of the railroad company, applies to all cases where the fire results from any step in the operation of the road; and the coupling of a charge of negligence in allowing combustible material to accumulate on the roadway, with one that the fire was negligently permitted to escape from a passing locomotive, will not take the case outside of the application of the statute. *Missouri Pac. R. Co. v. Merrill*, 40 Kan. 404.

CHICAGO AND EASTERN ILLINOIS R. CO.

v.

OSTRANDER.

(Indiana Supreme Court, December 12, 1888.)

Fire—Negligence—Use of Wood as Fuel.—When it is established by undisputed facts that the use of wood in a coal-burning engine very materially increases the danger of setting fire to and of burning adjacent property, it is not error to instruct the jury that the use of wood in a coal-burning engine engaged in propelling a train of cars constitutes an act of negligence.

APPEAL from Superior Court, Vigo County.

On petition for rehearing. For opinion on the original hearing, see 32 Am. & Eng. R. Cas. 361.

William Armstrong, Will H. Luyford, and L. D. Thomas for appellant.

H. C. Nevitt and David N. Taylor for appellee.

NIBLACK, J.—Complaint is made that we erred in holding that the argument submitted against the correctness of certain instructions given to the jury was insufficient to require us to review those instructions, and for that reason, as well as for alleged errors in giving two of the instructions referred to, we are asked to grant a rehearing in the cause. Counsel for the appellant, in their original brief, said : “ We believe the court below erred and misled the jury by giving instructions Nos. 17, 18, 19, 20, and 21, asked for by the appellee. In each of these instructions the court tells the jury that the use of wood in coal-burning engines, except in kindling fire before starting out, is negligence on the part of a railroad company.” They then quoted from instruction No. 19, in which the jury were told : “ And if you further find that wood was used on said engine, except such as was necessary as kindling before starting out, instead of coal, then such use of wood would be negligence.” They also quoted from instruction No. 21, to the effect that if the engineer had timely notice “ that his engine was to haul said train, it was his duty to have had sufficient fire to make steam without injury to property along the right of way,” and that his failure to do so was negligence. They thereupon made the point that the court, in giving said instructions 19 and 21, invaded the province of the jury by making the propositions announced matters of law instead of questions of fact for the jury to decide, and consequently erred. In support of the point thus made, counsel quoted from *Small v. Chicago, R. I. & P. R. Co.*, 50 Iowa, 348, where it is said that “ we regard it as sufficient that railroad companies employ the best-known means and methods. What lies beyond the known is not the province of courts or juries to consider.” We have frequently held that where several instructions have been given in a cause, they must, upon an appeal to this court, be considered as a whole, and that is undoubtedly the correct general rule. It is also a well-recognized rule that in construing a sentence or clause constituting a part of an instruction the context must be taken into consideration, so that all the parts may be construed together. We thought when this cause was heard, and still think, that the objection urged as above to a part of the instructions given at the trial could not rightly be regarded as an argument, either as against the sufficiency of any of the instructions as a whole, or as against any number of such instructions as a part of a series, to the extent of presenting any question for the decision of this court. But waiving all question of the sufficiency of the argument originally submitted by counsel, we see no substantial objection to the legal propositions announced by instructions 19 and 21, as applicable to the evidence

Contentions of
appellant.

Instructions
to be consid-
ered as a
whole.

Negligence in
using wood as
fuel.

in this cause. It was established at the trial by undisputed evidence that there was an essential difference between the netting used to arrest sparks in a coal-burning engine and that used in an engine in which wood is burned, and that the use of wood in a coal-burning engine very materially increases the danger of setting fire to, and of burning, adjacent property. In the case of *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47, which was a case of the same class as this, the court said: "The fire was caused by the defendant's engines. The engines were all coal-burners. It is more dangerous to burn wood in coal-burners than to burn coal therein. The net-work fire-arresters of a wood-burner have finer meshes than the net-work fire-arresters of a coal-burner." As was said in the opinion heretofore announced in this cause, when the facts are undisputed and well established, the question of negligence becomes a matter of law for the court. As the fact that the use of wood in a coal-burning engine very materially increases the danger of setting fire to, and of burning, adjacent property was indisputably established in this case, the court below did not err in telling the jury, as it did, in effect, that in view of this established fact, the use of wood in a coal-burning engine engaged in propelling a train of cars constitutes an act of negligence. The petition for a rehearing is overruled.

Fires—Use of Wood as Fuel in Engines.—It is held in New York to be the right of a railroad company to use any kind of fuel in common use, even inferior, unless its use was known to be hazardous. *Collins v. New York, etc., R. Co.*, 5 Hun (N. Y.), 499. But it is negligence on the part of a railroad engineer to use wood in a coal-burning engine, for the reason that the meshes in the wire netting used to prevent the escape of sparks are made much larger when coal only is used for fuel, and the fire sparks from wood are much more dangerous because they retain the fire for a much greater length of time. *Chicago & A. R. Co. v. Quaintance*, 58 Ill. 389.

In *St. Joseph, etc., R. Co. v. Chase*, 11 Kan. 47, which was an action against a railroad company for negligently permitting sparks to escape and thereby setting fire to plaintiff's property, it was held that where all the engines belonging to the defendant were coal-burners, and where it could be shown that it was more dangerous to burn wood in a coal-burner than to burn coal therein, it was competent for the plaintiff to show that the defendant was burning wood in its engines in general, without showing more particularly that wood was burned in the particular engine that caused the fire.

In *New Brunswick R. Co. v. Robinson*, 11 Sup. Ct. of Canada, 689, 29 Am. & Eng. R. Cas. 132, R. owned a barn situated about two hundred feet from the New Brunswick R. Co.'s line, and such barn was destroyed by fire, caused, as was alleged, by sparks from the defendant's engine. An action was brought to recover damages for loss of said barn and its contents. On the trial it appeared that the fuel used by the company over this line was wood, and evidence was given to the effect that coal was less apt to throw out sparks. It also appeared that at the place where the fire occurred there was a heavy up grade, necessitating a full head of

steam, and therefore increasing the danger to surrounding property. The jury found that the defendant did not use reasonable care in running the engine, but in what the want of such care consisted did not appear by their finding. *Held*, reversing the judgment of the court below, that the company were under no obligation to use coal for fuel, and the use of wood was not in itself evidence of negligence; that the finding of the jury on the question of negligence was not satisfactory, and that therefore there should be a new trial.

PIELKE

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

(*Dakota Supreme Court, February 24, 1889.*)

Fire—Proximate Cause—Question for Jury.—The fire which caused the injury to plaintiff's building occurred between 2 and 3 P.M. A witness testified that a few minutes after the passing of a train about 10 A.M., he discovered the fire, and that he succeeded in putting it out. It was shown by the plaintiff that the afternoon and forenoon fires were caused by the same engine, and that the original fire must have backed against the wind a considerable distance and then run before a stronger breeze which sprung up in the afternoon. *Held*, that the question whether the fire caused by the train which passed during the forenoon was the proximate cause of the injury to plaintiff's premises ought to have been submitted to the jury.

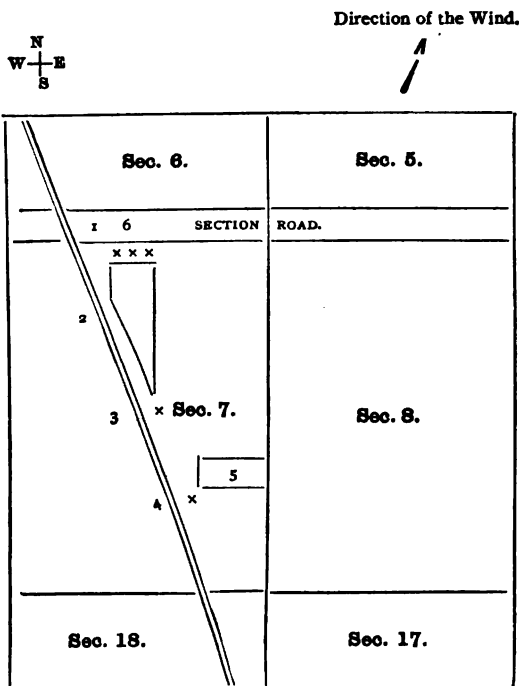
APPEAL from District Court, Richland County.

Action by Michael Pielke against the Chicago, Milwaukee & St. Paul R. Co. to recover damages for loss of property resulting from a fire caused by one of defendant's engines. The defendant appeals from a judgment for the plaintiff. The diagram on the following page describes the situation of premises:

Alfred Waller for appellant.

W. S. Lauder for respondent.

TRIPP, C.J.—This is an action brought to recover for damages sustained by fire alleged to have been set by defendant's engine upon its right of way, which spread and extended to plaintiff's land, destroying hay, buildings, trees, and other property. There is no contest between plaintiff and defendant but that the fire occurred which did the damage, and that the amount of damages found by the jury is a reasonable and proper amount; but the defendant insists that it did not set the fire, and that the evidence is insufficient to sustain the verdict in that respect. Case stated.



No. 1. Hack Crossing.
 No. 2. Starting point of A.M. fire.
 No. 3. Where fire turned ploughing in P.M.
 No. 4. Point west of School-house.
 No. 5. School-house.
 No. 6. Johnson's Log-house and Hay-stacks.

Distance from 1 to 2.....1,300 ft.
 Distance from 2 to 31,200 ft.
 Distance from 3 to 4.....1,110 ft.
 Total from 1 to 4.....3,700 ft.

It appears from the abstract in the case that in the fall of 1885, some time in the last part of September or fore part of October, the defendant's railway ran and was located across sections, 6, 7, and 18, township 135, range 149, extending in a north-westerly direction. The plaintiff was the owner of certain lands in section 5, about a mile in a north-easterly direction from where the fire was first discovered. The theory of the plaintiff is that the train of defendant, passing south in the forenoon, set fire to the dry grass upon its right of way adjoining the land of one Johnson, in section 7; that this fire backed south against the wind during the forenoon, and was the same fire that was discovered in the afternoon running in a north-easterly direction, and which damaged the plaintiff. There is a section road running east and west between sections 6 and 5 on the north, and 7 and 8 on the south. In section 7, immediately south of this road, and adjoining the railroad on the east side, was a field of breaking, belonging to one Erick

Johnson, extending north and south about one half mile, and occupying the triangular piece of land on the east side of the railroad, except a small piece of prairie in the angle where the railroad and highway cross each other, and a small building spot south of the highway, and between it and the breaking. Along the railway, and between the road-bed and breaking, the right of way was covered with dry grass, some of which had been mowed, and lay upon the ground. Along this right of way, and parallel with the railroad, there was also a carriage road used by teams and carriages.

Lindgren, a witness for the plaintiff, testified that during the forenoon he was at work on his place on section 6, north of the section-line road, and saw the defendant's train go south, and that in a few moments thereafter a fire sprang up along the right of way "close into the track," at about the southern angle of the triangular piece of prairie between the Johnson breaking and the railroad; that this fire burned over this small piece of prairie, and burned up to Johnson's buildings, but that he succeeded in saving the buildings and stacks, and "put out the fire;" that after dinner, and about 2 o'clock in the afternoon, he discovered "another fire" about 40 rods further south, and at the south extremity of Johnson's breaking; that the wind was then blowing from the south-west towards the plaintiff's premises, which it soon reached, and did the damage complained of. This witness did not see any fire after the fire in the forenoon until the fire about 2 o'clock P.M., nor did any one but him see the fire in the forenoon. Witness was permitted to give his opinion that the fire he saw in the morning backed south against the wind until it got past the Johnson breaking, and then was carried in a north-easterly direction onto the land of plaintiff; and one other witness, Mr. Dow, one of plaintiff's attorneys, was permitted to testify that something over a week after the fire he examined the premises, and found the prairie grass on defendant's right of way between the road-bed and the Johnson breaking burned off, and the entire right of way west of the breaking burned over.

Defendant contends, first, that the evidence was insufficient to prove there was any fire in the forenoon; second, that there is no evidence to prove that the fire in the forenoon and the fire in the afternoon were the same.

1. It is true that much suspicion is thrown upon the evidence of Lindgren as to the fire he claims to have extinguished west of the Johnson breaking. The land in that vicinity is shown to be comparatively level, with nothing to obstruct the vision for several miles, and along the entire right of way where the fire is claimed to have originated. A number of people were at work during the en-

Evidence as to
fire in fore-
noon.

fire forenoon in the vicinity, and in full view of the premises. Mr. Marty, a witness for the plaintiff and defendant, both testified that he was at work in section 8, across a quarter section from the Johnson breaking, and in full view of it; that he was ploughing during the forenoon; that he saw no fire, and that if there had been a fire he could and probably would have seen it; that the first fire he saw was about 2 o'clock in the afternoon, south of the Johnson breaking. Erick Johnson, the owner of the Johnson breaking and premises, testified that he was away from home during the forenoon; that when he got home in the afternoon the fire had gone past his place to the north-east, and that Lindgren, the witness, was there, and had his oxen and team there, and told him (Johnson) that he had put out the fire around his (Johnson's) place, but did not say anything about a fire in the forenoon. Swan Swanson testified that during the forenoon he was ploughing on the east side of the railroad, and south of the Johnson premises, and saw no fire during the forenoon; that he was at Anderson's place on section 8, east of the school-house, when the fire started on the right of way south of the Johnson breaking, and that it was "round like—just as if it had been lately started." Ole Anderson, for whom Swanson worked, testified that during the forenoon he was ploughing in section 8, at the south-east corner of the north-west quarter; that there was nothing to obstruct his view, and that, if there had been a fire on the right of way, he could and probably would have seen it; and he further ventures the opinion that he "don't believe there was any such fire there in the forenoon;" that he was at his own house when the afternoon fire started; that it started directly west of his house, and west of the school-house, and south of the Johnson breaking—about 50 or 60 rods; that he raised up from his seat, and said to Swan, "There is a fire just starting;" and that it was just about 2 o'clock at that time. Ethleen Kuppenberg, a school-teacher, was at the school-house in section 7, west of Anderson's house, towards the railroad, and testified that she was "on the watch for prairie fires;" that the first fire she saw was about 2½ P.M., directly west from the school-house, near the railroad; that "it had just started;" that she is positive as to the time, owing to her recess that day; and that she never heard of any forenoon fire until a week ago.

The evidence as to the forenoon fire rests almost entirely upon the testimony of Lindgren. No one else saw it, though they had nearly equal opportunities with him, and were no doubt actuated by the usual vigilance that characterizes the observation of the farmer at that time of year with reference to prairie fires. There was, however, no impeachment of this witness. He swore positively to the facts, as he claimed them, and no motive was shown for wilful false swearing upon his part. The jury have had the op-

portunity of seeing the witnesses, and weighing their testimony, under the instructions of the court; and the lower court has denied a new trial on this ground, and we cannot, without violence to the law governing appellate courts, disturb the finding.

2. Is there sufficient evidence to prove that the fire in the forenoon and the fire in the afternoon were the same fire? A careful analysis of the evidence, and the proceedings had, convinces us that one proposition of law has been entirely overlooked in the trial and consideration of this case; and while we deem the question properly here, under the exceptions taken, no reference has

Fire in fore-
noon and fire
in afternoon
the same.

been made to it directly in the argument of counsel, nor was it mooted in the trial of the lower court; and that is, the entire absence of any evidence to show that the fire, if it resulted from the forenoon fire, was a continuous one, or that the fire in the forenoon was the proximate cause of the damage sustained by the plaintiff. It was from a mile to a mile and a half from the initial point of the fire first seen in the afternoon to the premises of the plaintiff. The fire, in its most direct course, must cross the farm of several others, besides the highway; and while the fire been at the right of way in the afternoon, or the "afternoon fire" as it is designated by the witnesses themselves, is shown to have been continuous, there is not only an entire absence of any showing that the fire seen by Lindgren continued to burn and was the same fire that did the injury, but the positive evidence is that the forenoon fire was entirely extinguished. At most, there is a mere opinion of the witnesses that the forenoon fire backed up and became the afternoon fire; and there is some evidence that the right of way along which it would have made such journey was burned over. But all this could have been done by the fire seen first in the afternoon. It could have run west of the breaking at the same time it ran east. No one pretends to say it did not, and, if the evidence of Lindgren is to be believed, there was but little left on the west side of the breaking to burn when he put out the forenoon fire. Besides, the witness Dow testifies that the right of way was burned out clean. "This strip was burned clean out, close to the road here, next the building,—burned clean from the track and the breaking, down to the point right at the south end of the breaking." And this he repeats several times,—"burned right up close to the railroad track." This is not usual with back fires. This testimony would tend to show that it was burned by a direct fire from the south. There is no evidence upon which the court can say the jury would be warranted in finding the fire of the forenoon was the proximate cause of plaintiff's loss. There is no direct evidence to prove this fact, but the direct evidence is to the contrary, and

the circumstances relied upon to prove such theory tend as strongly, and more so, to prove the opposite one.

The doctrine of proximate and remote cause has undergone great discussion in this country and in England; and, while the courts have attempted to define what is proximate and what is remote damage, it may be truthfully said:

Proximate
and remote
cause.

"There can be no fixed and immediate rule upon the subject that can be applied to all cases. Much must therefore depend upon the circumstances of each particular case." Page v. Bucksport, 64 Me. 53. The difficulty is not in the truth of the maxim, *causa proxima non remota spectatur*, but in its application. Greenleaf lays down the rule that "the damage to be recovered must always be the natural and proximate consequence of the act complained of." 2 Greenl. Ev. § 256. Parsons, after referring to the confusion in which the question is left by the decisions, says: "We have been disposed to think that there is a principle derivable, on the one hand, from the general reason and justice of the question; and, on the other hand, applicable as a test in many cases, and perhaps useful, if not decisive, in all. It is that every defendant shall be held liable for all of those consequences which might have been foreseen and expected as the result of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into his consideration." 2 Pars. Cont. 180.

Proximate and remote damages are the result of proximate and remote causes, reasoning in an inverse order. Strictly speaking, there are no remote causes and no remote damages; the proximate cause is that which produces the damage. The remote cause is used, by comparison, as the irresponsible agent which seeks shelter behind the responsible one. The proximate cause is the *vis major* which intervenes and usurps the place of the primary force, or unites with and overcomes it, so as to become the principal and real cause of the damage sustained; or it is the primary cause, traced back through intervening and intermediate causes, by natural and continuous succession, from the injury resulting to the wrong committed. The intermissions existing, the time elapsing, or minor cause intervening, do not affect the conclusion, so that the original cause be continuously operative as the principal factor in producing the final result. The cases have generally arisen where a large number

Same—De-
struction of
separate build-
ings—Authori-
ties.

of buildings, separate and detached from each other, have been successively destroyed; and, while the cases are by no means harmonious, we think it may be safely stated that whenever the fire has been of that character that the firing of the second or third building, or others in succession, was the direct and natural result

of the firing of the first, under the circumstances of the case, the original fire was the proximate cause. But if the location of the buildings was so remote, or the location and circumstances such, that the party committing the wrong could not naturally have expected such a result, or such result would not naturally have flowed from such a cause, then it is not proximate, but remote.

The cases of *Ryan v. New York Cent. R. Co.*, 35 N. Y. 214, and *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353, are generally cited as holding that, as a matter of law, the firing of the second building by taking fire from the first is remote, and not proximate; but I think a careful study of these cases, and a limitation of the doctrine announced to the facts of such case, will bring them in line with the decisions of other states where no statutes have intervened to govern the opinion of the courts. Chief Justice Thompson in *Pennsylvania R. Co. v. Kerr*, *supra*, uses the following language: "There might possibly be cases in which the causes of disaster, although seemingly removed from the original cause, are still incapable of distinct separation from it. . . . The maxim of *causa proxima non remota spectatur* is not to be controlled by time or distance, but by the succession of events." And such is the view taken of these cases in the states where they were rendered. *Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373; *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420. The rule is very clearly and succinctly stated in *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475, a case in which a steamboat had set fire to an elevator, which communicated to a mill and lumber-yard, disconnected and distant therefrom about 388 feet. The lower court had been asked to charge, as a matter of law, that the injury was too remote, and the refusal of the court so to charge was alleged as error; and the supreme court, on appeal, in affirming the action of the lower court, and holding that under the circumstances of that case it was a proper question for the jury, says: "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science, or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. *Scott v. Shepherd*, 2 W. Bl. 892. The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and

the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen, in the light of the attending circumstances. . . . We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But, when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. . . . In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of the jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are discovered by new and independent agencies; and this must be determined in view of the circumstances existing at the time."

New Jersey, in a carefully considered case, states the rule as follows: "In the rule which limits a recovery for a tort to those damages which are its natural and proximate effects, the natural effects are those which might reasonably be foreseen,—those which occur in an ordinary state of things; and the proximate effects are those between which and the tort there intervenes no culpable and efficient agency." *Wiley v. West Jersey R. Co.* 44 N. J. Law, 247. And in Maryland the courts have adopted the same rule: "In a case where the fire has not been communicated directly to the plaintiff's property by sparks or cinders from the locomotive, as where it has spread from its first beginning, and thus been communicated indirectly to the plaintiff's property, it is a question proper to be submitted to the jury to determine, from all the facts of the case, whether the injury complained of is the natural consequence of the defendant's negligence, or whether it has been caused by 'some intervening force or power, which stands naturally as the cause of the misfortune.'" *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115, 11 Amer. Ry. Rep. 210. Justice Miller in *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. (U. S.) 52, says: "One of the most valuable of the *criteria* furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accom-

plished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

In *Fent v. Toledo, P. & W. R. Co.*, 59 Ill. 349, the facts were similar to those in *Milwaukee & St. P. R. Co. v. Kellogg*, *supra*. The railway company had set fire to a warehouse by sparks from its engine, which had communicated to plaintiff's buildings, about 200 feet distant, but disconnected therefrom; and Judge Lawrence, in a very well-considered opinion, goes over the whole doctrine, English and American, and criticises the cases of *Ryan v. New York Cent. R. Co.* and *Pennsylvania R. Co. v. Kerr*, *supra*, with much severity, as announcing a doctrine at variance with the decisions of all other American courts, and as standing alone. This case was before the supreme court on appeal from the decision of the lower court in sustaining a demurrer to evidence, under the practice of that state; the question being whether, as a matter of law, the injury was remote. The court held that it was, under the facts of that case, a proper question for the jury, and reversed the case. In delivering the opinion of the court Judge Lawrence laid down the rule as follows: "If a loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth,—the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire. If, on the other hand, the fire has spread beyond its natural limits by means of a new agency,—if, for example, after its ignition, a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind,—such a loss might fairly be set down as a remote consequence, for which the railway company should not be held responsible." In a later case in that same state (*Toledo, W. & W. R. Co. v. Muthersbaugh*, 71 Ill. 572), the second building was situated 101 rods from the first building set on fire from the engine. It was covered with straw, and there were no intermediate buildings. A high wind was blowing in a direct line towards it from the first building burned. The court held, as a matter of law, that the injury was too remote; citing with approval the rule announced by Judge Lawrence in *Fent v. Toledo, P. & W. R. Co.*, *supra*.

Rorer on Railways, after an elaborate review of the authorities, states the doctrine derived therefrom as follows: "To our mind the American cases clearly recognize seven classes of cases settled by authorities in regard to damages by fire communicated from engines of railroad corporations, each of which is to be regarded as controlling, and as a rule of decision, within its

own respective judicial spheres. (1) That, except where altered by express statutory enactment, there prevails, everywhere in the American courts, the well-known common-law rule that one is not liable for the consequences to others of a prudent and lawful use of fire upon his own premises, if without fault or negligence on his part, although it escapes, if without his fault, to that of his neighbor, and do him an injury there. (2) That one is liable for an injury that occurs to another by an imprudent or unlawful use of fire on his own premises; or, if properly used there, then for negligently suffering it to escape to the premises of another, whereby a damage is done to the owner thereof. (3) But, to sustain an action in such cases, the injury must be the direct and proximate result of solely the act complained of; or, in other terms, the act complained of must alone have been the direct, proximate, and sole cause of the injury and damage sustained, and not merely remotely so. (4) That the cause of the injury is proximate, and the damage is the proximate result thereof, so long as the fire is continuous in its progress and ravages, by an unbroken chain or connection. (5) That the cause of the injury is but remote, and the damage is but the remote result thereof, as to all the ravages of the fire caused by a rekindling thereof, or communication of it anew, from and beyond where there occurs an open break in the burning or chain of its continuity; that in such latter case the first fire, and not the original negligence of the party setting it out, is the cause of the latter, and of the injury done thereby; and that, therefore, the original setting out and the latter injury are, in their relations to each other, remote, and no liability exists. (6) Under the statute in Massachusetts, the rule of liability, as settled in the courts of that state is, that railroad corporations are absolutely liable for all damages caused by fire communicated from their engines, irrespective of the question of negligence. (7) That by statute in some others of the states, where the negligence of the company is yet an ingredient of liability, the injury is made to be presumptive evidence of negligence, and the burden is shifted on to the railroad companies, defendants, to negative the same by proof of proper care." 2 Ror. R. 806-808.

The case of *Doggett v. Richmond, etc., R. Co.*, 78 N. Car. 305, is parallel, and almost identical, with the one at bar. The original fire set by the engine occurred about 10 or 11 o'clock in the forenoon, and, having run across the lands of several persons, and burned several fences, had been extinguished, as was supposed, before it reached the land and fence of plaintiff; but later, and somewhere about 3 o'clock in the afternoon, the fire was discovered burning the fence of plaintiff, and subsequently did the damage complained of. It was presumed that the original fire of the forenoon had not been all extinguished, and

was rekindled by the wind. There was no direct evidence, otherwise than could be conjectured from its path, to connect the fire of the forenoon with that of the afternoon fire which did the damage. The court, in reviewing the judgment of the lower court upon a verdict against the company, says: "The fire had been checked, and was supposed to have been extinguished by those who had been contending with it, and they had retired from the ground. Here was a cessation of the cause, a rest,—an interval of what duration is not stated. What occurred afterwards, resulting in the plaintiff's injuries, was remote damage, which could not be reasonably foreseen or anticipated by the defendant as a necessary or probable result of the first negligence; and in point of fact those who were on the ground, and the witnesses and the actors at the point of conflagration, and whose judgment is entitled to most weight, did not anticipate a further spread of the fire. These persons were the neighbors, and probably the owners of the fences on fire, and as such were most deeply interested in securing themselves against present and future danger. If they did not contemplate a renewed outbreak of the fire, upon no reasonable hypothesis can it be assumed that the defendant contemplated it as a necessary or probable result of the first cause. The facts do not constitute such a continuous succession of events, so linked together as to become a natural whole, which would make it a case of proximate damages; but the chain of events, by the temporary cessation and extinguishment of the fire, was so broken that it became independent, and the final result cannot be said to be the natural and probable consequence of the primary cause,—the negligence of the defendant. The maxim here applies, *causa proxima non remota spectatur*."

Let us apply the doctrine of these cases to the one at bar; and conceding, as the jury must have found, the fact to be that there was a fire in the forenoon, there must have been a number of hours intervening between the time the first fire was supposed to have been extinguished and the time the second fire was discovered.

Same—Principles applied to case at bar.

Lindgren testifies that it was about 11.30 A.M., but several witnesses swear that he had told them at other times prior to the trial that it was about 10.30 A.M.; and the time-tables which were in evidence fixed the time for the departure of this train from the station north at 9.05 A.M., and the time of its arrival at the station south as 9.55. The evidence, however, showed that that train was frequently late; so that the probability is that the fire did not occur later than some time between 10 and 11 A.M. The witnesses substantially agree that the afternoon fire occurred some time between 2 and 3 P.M., so that there must have existed an interval of at least three or four hours between the time the

first fire was extinguished and the occurrence of the second fire. The testimony is that the wind came up strong from the southwest at about 2 o'clock, and that the fire spread with great rapidity. Can it be said that the defendant, if it set the first fire, could have anticipated such a result? Could it be presumed to have foreseen more than the witness on the ground, whose own property was endangered, and who swears that he put it out and went home? He must not only have presumed that the fire would spread no further, but he must have felt sure and certain that it was extinguished. An igniting or firing of the prairie grass at that season of the year was like bearing a lighted candle into an open powder magazine; and if the witness, with such danger confronting him, would have felt sufficiently certain that no further damage could result from the forenoon fire, can it be said the defendant ought originally to have foreseen the actual and final result? Again, was not the wind, which sprang up with renewed force in the afternoon, the intervening agency, the proximate cause, which produced the injury complained of? If some human agency had rekindled the smouldering fire, and scattered it along the dry, unburned grass, producing the same result, no one would have said the first wrong-doer was responsible for the loss occasioned by the subsequent fire; and ought the defendant to be the more responsible because the power was superhuman?

In each case the question is, What was the direct cause of the result? There must be an end somewhere; there must be some place at which the courts will call a halt, and say that it will refuse longer to trace effect to primary cause, where the object is to fix liability and award compensation for damages sustained and wrong suffered. If this were not so, in the infinite changes that occur, and the intimate relations that exist, between all agencies, natural and artificial, almost any man might be liable to be indirectly connected with a wrong committed. No better rule of compensation can be devised than that allowed by the rule making the wrong-doer liable for such damage as might be reasonably anticipated by him under the circumstances in which he was placed when he committed the act complained of. This rule has been approved by this court in *Hannah v. St. Paul, M. & M. R. Co.*, 37 N. W. Rep. 717 (determined at the February term of this court, 1888), and the cases there cited, where the rule is laid down that, in the construction of roads, bridges, and similar work, the workmen are only required to construct them in the usual and ordinary manner, and are not required to provide against tornadoes, cyclones, and unusual superhuman force.

But while we are inclined to hold that upon the testimony as it is presented in this case, that the fire claimed to have been

Question is,
what was direct cause?

set by the defendant in the forenoon was not the proximate cause of plaintiff's loss, we are not required to pass finally upon this question ; for there was, in our judgment, clearly a mistrial of this case, in that, if the facts would have warranted a submission of this case to the jury, it should have been submitted so that this question could have been passed upon by them. What is the proximate and remote cause is generally a question of fact, and must be submitted to the jury under proper instructions from the court ; and while in this case we are inclined to think the court was warranted in refusing the instructions asked for by the defendant, and while it is also generally true that the mere failure of the court to instruct upon a given proposition, upon which he is not asked to instruct, is not error, yet, if in his failure to so instruct the appellate court can see from the instructions given that the jury were misled, it is its duty to grant a new trial. An inspection of the charge in this case reveals the fact that the court touched upon this question but once, and he then told them : " The negligence charged here is the negligence charged in the manner in which they kept their right of way. Counsel for plaintiff desires me to say that, it being demonstrated that this fire was at a point below the ploughed strip, as indicated upon the diagram, that being agreed to have been in the afternoon, unless you find as a matter of fact that the fire as seen by Lindgren has a connection with this fire the plaintiff expects a verdict for the defendant ; so that takes away a great deal of my charge." This was not only misleading, but if it was meant thereby to tell the jury that they could find for the plaintiff, if they find that the second fire had any connection with the first fire, it was error ; for, as we have seen, the jury must not only have found a connection between the two fires,—they must also have found that the first fire, or the wrongful act causing it, was the proximate cause of the second fire, and of the damage arising therefrom. This is the only place in the entire charge in which the court referred to any connection between the first and second fire, and he made this statement so prominent as to tell the jury that it " took away a good deal of his charge " already given. If the cause was submitted to the jury at all, it should have been submitted under such instructions as would have given them clearly to understand that it was for them to determine whether the fire in the forenoon, claimed to have been seen by Lindgren, was the direct and proximate cause of the fire by which the plaintiff sustained the damage complained of. .

There was clearly a mistrial in this case, and, as other evidence may be produced upon a new trial which may connect the fire in the forenoon with that in the afternoon, and make it the primary cause, the judgment of the lower court is reversed, and

the cause remanded for a new trial, subject to the opinion of this court therein. All the justices concur.

Fires—Proximate and Remote Cause of Injury.—See *Canada So. R. Co. v. Phelps*, 35 Am. & Eng. R. Cas. 207, note, 235; see also “Fires Caused by the Operation of Railways,” 8 Am. & Eng. Encyc. Law, p. 13.

FLANNIGAN

v.

CANADIAN PACIFIC R. CO.

(17 *Ontario Reports*, 6.)

Fire—Dry Grass at Side of Track.—During a very dry summer the defendants allowed brush and long dry grass to remain uncut on the side of the track adjoining the plaintiff's farm, while they had the day previous to the fire, for the protection of their own property on the other side of the track, burnt up the dry grass, etc., there. A spark from defendants' engine having set fire to the dry grass, etc., adjoining the plaintiff's land, the fire extended and destroyed his fences, growing crops, etc. *Held*, that, the case having been properly submitted to the jury, a verdict for the plaintiff could not be interfered with.

THIS was an action to recover from the defendants damages for the destruction by fire of the plaintiff's fences, meadow, pasture, horse-rake, hay, growing crops and surface soil on his farm in the township of Oxford, in the county of Grenville, which fire the plaintiff alleged in his statement of claim was caused by the defendants' negligence in allowing brushwood, dry grass, rubbish, and other combustible material to remain on the line of their railway; and that sparks from an engine, running on the said railway, set fire to such dry grass, rubbish, etc., on the line of the railway, and from thence spread to the plaintiff's farm, and destroyed his fences, growing crops, etc.

The cause was tried before Street, J., and a jury, at Brockville, at the Fall Assizes of 1888.

The St. Lawrence & Ottawa Railway, now owned by the defendants, runs through lot 25, in the 5th concession of the township of Oxford, occupied by the plaintiff as the lessee thereof; and on the 10th of August, 1888, between three and four o'clock in the afternoon, shortly after a train had passed, a fire, which was stated by a witness named Sword to have started within the railway enclosure, was discovered by him when it had burned three or four panels of the fence dividing the railway lands from the plaintiff's farm, and the fire had spread into

the plaintiff's meadow, and from the high wind spread with great rapidity to the barn, which was destroyed with its contents, stated to be about 27 loads of hay.

The summer of 1888 was a very dry one, little rain having fallen during the season, and none for some time prior to the date of the fire. Fires had also been frequent through that part of the country during the few weeks preceding the one which destroyed the plaintiff's property.

There was evidence that on the sides of the track there was brush and long grass; and the plaintiff stated, when under cross-examination, there was stuff there that had been growing two or three years; and on the 9th of August the railway section-men burned the long grass in the immediate vicinity of a pile of snow gates belonging to the railway company, which were on the west side of the track, and directly opposite to the plaintiff's meadow, which was to the east of the track; but they did not burn the grass on the east side. One of them said he had examined the place after the fire, and "that on the east side of the track the grass was not burned except where the fire had apparently started. It was not either cut nor the grass burned."

There was no conflict of evidence as to the value of the property destroyed.

The learned judge charged the jury, and submitted certain questions to them which, with their answers, were as follows:

1. Was the fire of the 10th August caused by sparks escaping from one of the defendant's engines? Yes.
2. Did the fire commence within the railway company's fences or upon the land of the plaintiff? Within the railway company's fences.
3. If the fire originated upon the company's land, was it in any place where dry grass and bushes grew? The fire started where the dry grass and bushes grew.
4. Had the railway company properly cleaned their land from old grass and bushes in the spring before the fire? No, they had not.
5. Had the railway company omitted any proper precaution for preventing the sparks from the engine from kindling fire upon the land? Yes.
6. If so, what precaution did they omit? They omitted to remove the dry grass and bushes.
7. If the plaintiff is entitled to recover damages on account of the fire of the 10th of August, at what sum do you fix them? \$414.

Upon these findings the learned judge ordered that judgment be entered for the plaintiff for the sum of \$414.

In Michaelmas Sittings, 1888, the defendants moved to set aside the findings of the jury and the judgment entered thereon, and to enter a judgment for defendants, or for a new trial. The notice of motion, although embracing five grounds, was, upon the argument, practically reduced to three, namely: that the findings of the jury were contrary to law and evidence and the weight of evidence; that there was no evidence of negligence

on the part of the defendants in omitting to remove dead grass and bushes from the lands; and that there was no evidence that the fire started where dried grass and bushes grew, as found by the jury in their answer to the third question.

In the same Sittings, *R. W. Scott, Q.C.*, and *G. H. Watson*, supported the motion.

Wallace Nesbitt and Kidd, contra.

MACMAHON, J.—My brother Street left the case to the jury with a charge to which the defendants could have no reasonable grounds of complaint.

Counsel for the defendants admitted that had the railway company cut the grass and brush, and piled the same along the sides of the railway line, and it had become ignited from a passing engine, and spread to the plaintiff's farm and destroyed his property, the railway company would have been liable under the authority of *Smith v. London and South-Western R. Co.*, L. R. 5 C. P. 98, and L. R. 6 C. P. 14. But that not having increased the risk to the plaintiff's property by cutting the grass, and thus, as it were, adding to its combustible nature, negligence cannot be imputed to them; and therefore that the case should not have been submitted to the jury.

I have examined a number of authorities in the American courts on this question; and it is not, according to these authorities, by any means a conclusion of law that a railway company is guilty of negligence to be inferred from the fact that fire ignited in dry weeds or grass upon their land; but that it is a question of fact to be determined by the jury in view of the extent to which the weeds and grass have been permitted to accumulate on their right of way, the season of the year, and all other circumstances affecting the liability to fire. *Ohio & Mississippi R. Co. v. Shanefelt*, 47 Ill. 497, at p. 500; or, as stated in *Wharton on Negligence*, 2d ed., sec. 873: "For a railroad company to leave light combustible material, consisting either of dry grass or light wood, along its line, in such a situation as readily to ignite from sparks, is such negligence as will justify a jury in holding it responsible for damage sustained by a fire communicated from such combustible material to a neighboring field."

In the present case the jury were called upon to consider the fact of the dryness of the season, the extent of the dry grass and brush along the side of the track, and also the fact that the day previous to the fire which destroyed the plaintiff's property, the railway company, taking what they deemed a necessary precaution for the preservation of their own property—the snow gates—had burned

Negligence in leaving grass on right of way.

Same—Question of fact.

Verdict of jury not disturbed.

the grass and weeds on the west side of the track in close proximity thereto.

With these facts in evidence the case was properly submitted to the jury; and with their finding upon the facts we do not feel called upon to interfere.

The motion must be dismissed, with costs.

GALT, C. J., and ROSE, J., concurred.

Fire—Combustible Matter on Right of Way—Pleading.—In an action against a railroad company for damages from fire caused by sparks from its locomotive, it was held that allegations that defendant carelessly and negligently permitted grass and other combustible matter to accumulate upon its right of way, and that sparks emitted from a passing locomotive set fire to such accumulation, and the fire spread over plaintiffs' adjoining land and consumed their hay, are sufficient without allegations or proof that the locomotive was kept in an improper condition and carelessly operated. *Louisville, N. A. & C. R. Co. v. Hart*, Ind. Sup. Ct., June 5, 1889.

The court said: "If a railroad company negligently and carelessly permits grass and other combustible matter to accumulate upon its right of way, and fire is emitted from one of its passing locomotives, and falls upon the grass or combustible matter that has been allowed to accumulate from want of proper care on its part, and the fire spreads and passes over upon the lands of the adjoining proprietor, and burns and consumes his property, he being guilty of no negligence contributing to the injury, the railroad company is liable for the loss sustained. *Indiana, B. & W. R. Co. v. Overman*, 110 Ind. 538, 29 Am. & Eng. R. Cas. 161; *Pittsburgh, etc., R. Co. v. Jones*, 86 Ind. 496, 11 Am. & Eng. R. Cas. 76; *Brinkman v. Bender*, 92 Ind. 234; *Pittsburgh, etc., R. Co. v. Hixon*, 110 Ind. 225, 32 Am. & Eng. R. Cas. 374. As the verdict states nothing as to the condition of the engine, or as to the manner in which it was operated, the facts thus omitted must therefore be regarded as found against the plaintiffs. *Par-mater v. State*, 102 Ind. 90; *Johnson v. Putnam*, 95 Ind. 57; *Glantz v. City of South Bend*, 106 Ind. 305; *Spraker v. Armstrong*, 79 Ind. 577; *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399; *Louisville, N. A. & C. R. Co. v. Buck*, 116 Ind. 566. The appellant is therefore not injured because of the failure of the jury to find as to these matters, and as to any instructions asked for by the appellant and refused by the court, relating to the condition of the engine, and the manner of its operation, the same answer may be made."

In *Borland v. Chicago, M. & St. P. R. Co.* (Iowa, June 4, 1889), 42 N. W. Rep. 590, it was held to be error to refuse an instruction to the effect that, as it was not contended that the fire originated on defendant's right of way, the question as to whether the right of way was clear of combustible material need not be considered, when neither in the pleadings nor the evidence has any reference been made to the condition of the right of way.

See generally, as to negligence in leaving combustible matter on right of way, Gulf, etc., *R. Co. v. Benson* (Tex.), 32 Am. & Eng. R. Cas. 330; *West v. Chicago, etc., R. Co.*, 32 Ib. 339; *Atchison, etc., R. Co. v. Dennis*, 32 Ib. 318; *Bowen v. Minnesota, etc., R. Co.*, 32 Ib. 370; *Steele v. Pacific Coast R. Co.*, 32 Ib. 333; note, 32 Am. & Eng. R. Cas. 372, where all the authorities are collected.

MISSOURI PACIFIC R. CO.

v.

PLATZEL.

(Texas Supreme Court, February 26, 1889.)

Fire—Duty of Company to Extinguish.—Although a railway company may not have been guilty of negligence in setting out fire, it is subject to the duty of using such means to extinguish it as the circumstances would indicate to a prudent man was proper, and for a failure to use such means it is liable to an action for damages.

APPEAL from District Court, Galveston County.

Action by William Platzel and another against the Missouri Pacific R. Co. to recover damages for injuries to plaintiff's property resulting from a fire set out by one of defendant's locomotives. The defendant appeals from a judgment for the plaintiff.

Willie, Mott & Ballinger for appellant.

A. B. Buetell and *F. Charles Hume* for appellees.

STAYTON, C. J.—This action was prosecuted by appellees to recover the value of grass and other property alleged to have been destroyed by a fire which it is alleged was caused by sparks and fire negligently permitted to escape from one of appellant's locomotives. It is further alleged that the servants of appellant negligently failed to extinguish the fire when it originated, although they might have done so by the exercise of slight diligence. The cause was tried before a jury, and resulted in a verdict for appellees, on which a judgment was entered. Appellee's land seems to have been situated at a considerable distance from the railway. The great weight of the testimony tends to show that the locomotive from which it is claimed fire escaped was furnished with the most approved appliances to prevent the escape of fire, and that it was carefully operated by an experienced and skilful engineer and fireman, but there was testimony tending to show that fire could not have escaped, as witness testified it did, had the appliances to avoid its escape been such as appellant contends they were. The judgment, therefore, cannot be reversed on the ground that it is not supported by evidence. The court below more than once instructed the jury that appellees were not entitled to recover, unless the fire had its origin in the negligence of appellant or its servants. Two of the charges given were as follows: "Railroads are au

Instructions given.

thorized and allowed by law to run trains upon their tracks propelled by steam generated by fire, and they are authorized to use all reasonable means which will permit them to carry out the purposes for which they were created. They are permitted to use fire in their furnaces, and are not to be restricted in their operation, or held to liability because sparks of fire may be emitted from their engines. They are required to keep their engines in good order, and skilfully and carefully handled, and to use and keep in good order such appliances as the experience of practical railroad men determine are among the best to prevent the escape of sparks and fire, and to prevent the accumulation of combustible material on their right of way; and they are not required to do any more. If no appliances are invented which will prevent the escape of sparks and fire, and at the same time allow sufficient steam to be generated to properly propel their trains, then they are only required to use such appliances as are considered among the best by railroad experts." "If the jury believe from the evidence that the engine, at the time of the fire, was in good order, and skilfully handled by competent employees, and that it was supplied with appliances that are considered among the best by practical railroad men to prevent the escape of sparks and fire, and that said appliances were in good order, and that the servants and employees of defendant in charge of the train did not negligently permit the escape of sparks or fire therefrom, and that there was no accumulation of combustible material on the right of way in which the fire could start, they will find for the defendant, even though they may believe that the fire was caused by sparks from the locomotive." The court, however, gave the following charge: "If you believe from the evidence that fire from defendant's engines or appliances caused the burning of plaintiff's and intervenor's property, and that the employees of defendant saw the fire after its starting, and if you believe from the evidence that they could have extinguished it by diligence, and if you believe that they were guilty of negligence in not extinguishing it, then such negligence of the employees would be imputed to the defendant company, and make it liable for damages." It is contended that it was error to give this charge, and the proposition is made that "the company was not liable because of any negligence on the part of its employees in extinguishing the fire, or in failing to do so, unless it was an undisputed fact that the fire was started through negligence on the part of the defendant company." If the fire had its origin in the negligence of appellant, it would be liable whether its servants make effort, however strenuous, afterwards to extinguish it.

There is some conflict of authority as to whether it is negligence in a railway company to omit the extinguishment of a

fire, having its origin in the careful prosecution of its business.

Negligence in
failing to ex-
tinguish fire—
Authorities.

In *Kenney v. Hannibal, etc., R. Co.*, 63 Mo. 99, it was held that, if a railway company's servants saw a fire, and by the exercise of reasonable care might have extinguished it, their failure to do so would render the company liable, notwithstanding the fire had its origin in the careful management of the business of the company. The same case again coming before that court, the former decision was pronounced *obiter*, and a different rule established. 70 Mo. 256. In disposing of the question the court said: "We hold that the company is not liable because its servants neglected to extinguish the fire when they discovered it on the track. It was their duty as citizens to prevent the spread of the fire, and by their conduct on the occasion, as testified to by one of their number, they manifested a cruel and brutal indifference to the destruction of a neighbor's property, but it was not in the line of their employment, and was no more their duty to extinguish the fire than that of any other person who saw it. . . . If not liable for the origin of the fire, he (the master) cannot be held so on account of the neglect of a social duty by persons in his employment, in a business not connected with the origin of the fire, or imposing any duty to extinguish it in addition to that which every citizen owes to society." It may be that the inquiry in such a case is not, what was within the line of the servant's employment, but what was within the line of the master's duty, and what was it under obligation to make within the line of the servant's employment. To assume that a railway company is not liable for the origin of a fire caused by sparks from a locomotive having the most approved appliances to prevent the escape of fire, controlled by most careful and competent men, and on a right of way free from combustible material, is to assume, as matter of law, that negligence cannot coexist with those things: that a railway company that has in so far used due care has discharged its whole duty, and is under no further obligation to do more for the protection of property, along its line or near to it, from fire that may escape from its engines, although this might be done by the exercise of but little more care. The court of appeals of Maryland seems to have held that the exercise of the care specified in the two charges first above quoted would absolutely relieve a railway company from liability for an injury resulting from the escape of fire from an engine, and that no obligation whatever rested upon a railway company to extinguish a fire caused by the escape of sparks from a locomotive operated under such conditions. *Baltimore, etc., R. Co. v. Shipley*, 39 Md. 254. The cases to which we have referred were probably cases in which the owners of the land on which the fire occurred had been com-

compensated for the right of way through condemnation proceedings or otherwise, into which had entered the item of increased risk of fire from the construction and operation of the railroad in a careful manner. In some of the states this item of increased risk is taken into consideration in ascertaining the damages in condemnation proceedings, and this has sometimes been given as a reason why the exercise of the care stated in the two charges before referred to should relieve a railway company from further duty to provide against injuries resulting from fires caused in the conduct of their business. It would seem, even in such cases, in the absence of some settled rule of law prescribing the specific acts of care incumbent on a railway company, and with reference to which condemnation or other proceeding to acquire right of way may be presumed to have been conducted, that the true rule would be that a railway company would be liable for an injury from fire resulting from the failure of the company to use due care under the circumstances of a given case; for while "the company has paid for its right of way, and for all the inconveniences which were likely to result from the construction and use of its road, yet this does not cover all sorts of damage, . . . and it cannot cover damages arising from negligence, for the law never anticipates this in assessing damages, and it never allows people to purchase a general immunity for carelessness." *Huyett v. Philadelphia, etc., R. Co.*, 23 Pa. St. 374. In some of the states it is held to be the duty of a railway to extinguish a fire, having its origin in the conduct of the company's business, if this can be done by the exercise of ordinary care; and the inquiry as to whether this duty arises in all cases, or only in cases in which the fire originated through the company's negligence, seems not to have been deemed important. *Rolke v. Chicago & N. W. R. Co.*, 26 Wis. 538; *Erd v. Chicago & N. W. R. Co.*, 41 Wis. 66; *Bass v. Chicago, B. & Q. R. Co.*, 28 Ill. 1. If the injury from fire escaping from a locomotive be unavoidable, the business of operating them being lawful, no damages can be recovered for a loss thus accruing, unless this general rule be controlled by some constitutional provision; but if the fire have its origin in the negligence of the company, or without negligence, but in the conduct of its business, then we do not see that it would not be the duty of the company, in the one case as much as in the other, to use proper care to prevent injury to others.

The rule that a railway company owes no duty looking to the safety of property of persons situated on or near to its line, other than to use a high degree of care to prevent the kindling of fires through the escape of fire from their engines, seems to us a narrow rule. The business is conducted for the benefit of the company, and is of

Liability for
fires generally.

great advantage to the public, but there is no hardship in requiring them, not only to use a high degree of care to prevent the kindling of fires, but to extinguish them when they have their origin in the conduct of the company's business, if this can be done by the exercise of ordinary care. Every person has a right to kindle a fire on his own land, for any lawful purpose, and, if he uses reasonable care to prevent its spreading and doing injury to the property of others, no just cause of complaint can arise, yet, although "the time may be suitable and the manner prudent, if he is guilty of negligence in taking care of it, and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence, or only a want of ordinary care on the part of the defendant. *Bachelder v. Heagan*, 18 Me. 32; *Barnard v. Poor*, 21 Pick. (Mass.) 380; *Tourtellot v. Rosebrook*, 11 Metc. (Mass.) 462;" *Hewey v. Nourse*, 54 Me. 259; *Higgins v. Dewey*, 107 Mass. 494. If one who had kindled a fire on his own land should see it spreading, under the influence of a strong and unexpected wind, without which it would not have spread, should then use every possible effort to extinguish it before it reached the line of his own land, but be unable to do so, could he there cease his efforts, and be heard to say that he had discharged the entire duty cast upon him by law and the clearest principles of right, and was not liable for the destruction of his neighbor's house or barn by the fire of his own kindling, if it appeared that by ordinary diligence he could have arrested the fire soon after it had crossed his own line, and before it seriously injured his neighbor? We think not; for, having put in motion the destructive element, nothing short of the exercise of due care to prevent injury from it ought to relieve him from responsibility. He could not be heard to say that the limit of his obligation was fixed by and as narrow as the boundaries of his land. A failure under such circumstances to follow the fire across the line between him and his neighbor, and to extinguish it when he could, could not be said to be only the neglect of a social duty. If this be true as to an individual, who in the exercise of the highest care has kindled a fire on his own land for a lawful purpose, and who has no suspicion that thereby his neighbor's property is imperilled, what must be the rule with a railway company, claiming, as all do, that the business it is conducting is necessarily, when conducted with the utmost care, attended with danger to property along its line? The very ground-work on which the two charges given by the

court, and together before quoted, stand, is that, to conduct the business of such companies successfully, they must use fire in engines from which, with the use of the highest care, fire will sometimes escape, and property through this be destroyed. The cases show that it is not important whether the origin of a fire be in negligence, and that liability exists on the ground that the failure to use proper care to prevent the spread of fire lawfully kindled is negligence as clearly as is an originally unlawful kindling from which injury to another results. The kindling of a fire by the escape of sparks or coals from an engine, when the utmost care has been used to prevent their escape, and to prevent their kindling when they do escape, whether the fire arose on the company's right of way, or on contiguous lands, cannot be more lawful, or the obligation to extinguish less, than it is when done by an individual on his own land; and it cannot be said, without doing violence to reason and right, that as high an obligation does not rest on a railway company to extinguish a fire, when kindled under such circumstances, as rests on the owner of land when fire lawfully kindled by him spreads. The kindling in the one case is absolutely lawful, while in the other it is lawful by permission, if due care be used to control it, on the theory that engines on railways cannot be operated successfully without some danger of scattering fire. Without entering into any discussion as to the degree of care a railway company should use to extinguish a fire caused by the escape of fire from its engine, we feel constrained to hold that the duty does exist, however careful such companies may be to prevent the escape of fire from their engines, and that the failure to exercise such care as the circumstances of a given case would indicate to a prudent man was proper will give cause of action for an injury resulting. Some of the courts to whose decisions we have referred have held that specific acts of diligence were or were not required, but we are of the opinion that whether due diligence has been used in a given case is a question of fact to be passed upon by the court or jury trying a cause, when there is evidence on which such an issue fairly arises. We are of opinion, however, looking to the evidence, that the charge would have authorized a verdict in favor of appellees, for the failure of appellant's servants to do what, under the evidence, there is no reason to believe they could have done. The charge was evidently drawn with reference to the position of employees of appellant to the fire at the time it commenced, and not with reference to the general duty of appellant; and the appellee, with a knowledge of their position, and of the surroundings which tended to spread the fire rapidly, which he obtained from the other testimony, was evidently of opinion that the employees could not have

**Liability for
failure to ex-
tinguish fire.**

averted the spread of the fire, and such was the general tenor of the testimony. A charge should not be given where there is not sufficient evidence fairly to raise an issue of fact to which it relates; for the giving of a charge, under such circumstances, induces a jury to believe that in the opinion of the court there is such evidence. It may be that the finding of the jury would have been the same had the charge complained of not been given; but this we cannot know, and because the court gave it the judgment will be reversed, and the cause remanded.

Fire—Negligence in not Extinguishing Fire.—In the case of *Missouri Pac. R. Co. v. Donaldson* (Tex., Feb. 26, 1889), 11 S. W. Rep. 163, which was an action against a railroad company for damages for injury to grass, etc., caused by sparks from one of its engines, the only evidence bearing on the question whether the company's employees could have extinguished the fire was that two section hands were at work on the road about half a mile from the place where the fire began, that the grass was very dry, and a strong wind was blowing at the time, making the fire spread very rapidly. The court held that a charge was not justified which permitted the jury to find that the company was guilty of negligence, in that its servants not on its trains did not extinguish the fire. The court said: "It will be observed that these charges do not relate to the general duty of a railway company to extinguish a fire originating from sparks or coals escaped from an engine, and to its liability for the failure to use due care in this respect, but to the liability of the company on account of the failure of some of its servants to extinguish the fire, if they could have done so by the exercise of that degree of care persons of ordinary prudence would have observed under like circumstances. The first and second paragraphs of the charge complained of were correct, and the third, in so far as it defined negligence of appellant's servants not on trains, was correct, and if applied to those on trains would not have been erroneous, their duties to the public being always considered, but as to the last the charge was silent. The court probably intended to exclude the idea that appellant would be liable for the failure of its servants engaged in operating trains to extinguish the fire, and, if the charge was so understood, appellant has no ground to complain of the form of the charge; but we are of the opinion that the evidence did not justify a charge which permitted this jury to find that appellant was guilty of negligence, in that its servants not on trains did not extinguish the fire."

LOUISVILLE, NEW ORLEANS AND TEXAS R. CO.

v.

BIGGER.

(Mississippi Supreme Court, April 22, 1889.)

Live-stock—Unexplained Injury—Hoof Torn off Mule.—When it appears that the car in which a mule was carried was suitable, that the track was in good condition, that the equipments and appliances of the train were adequate, and that there was no fault, negligence, or want of care in any respect on the part of the carrier in handling the stock or in the running or management of the train, the carrier is not liable for damages to a mule which had its hoof torn off in transit from some unexplained cause.

Same—Injuries Inflicted by Animal upon Itself—Injuries Caused by Other Animals.—A carrier of live-stock is not liable for an injury inflicted upon an animal by itself, without fault on his part, or caused by other animals shipped in the same car.

APPEAL from Circuit Court, Washington County.

Action by B. F. Bigger against the Louisville, New Orleans & Texas R. Co., to recover damages for injuries sustained by a mule belonging to plaintiff, which was being carried by the defendant. Defendant appeals from a judgment for the plaintiff.

Yerger & Percy for appellant.

Phelps & Skinner for appellee.

ARNOLD, C.J.—There is dispute as to whether the special contract was fairly made and understood by appellee, and we dispose of the case as if there were no special contract.

The tenth instruction asked by appellant should have been given. Leaving the special contract out of view, appellant was not liable on the facts proved. The burden of proof was on it to acquit itself of liability, and this was done. *Chicago, St. Louis & N. O. R. Co. v. Abels*, 60 Miss. 1017, 21 Am. & Eng. R. Cas. 105.

It is not shown how the hoof of the mule was torn off, or whether it was done on the train or after it left the train; but it does appear that the car in which the mule was carried was suitable, that the track was in good condition, that the equipments and appliances of the train were adequate, that there was no culpable delay in the transit, and that there was no fault, negligence, or want of care, in any respect, on the part of the carrier or its employees in handling the stock or in the running or management of the train. Under these circumstances, the carrier is not liable for the injury

Carriers of live-stock are not liable for injuries inflicted by animals upon themselves or each other.

to the mule, which may have been self-inflicted, or caused by the other mules in the car, if, indeed, the injury occurred on the train.

It is true that upon receipt of the mule for transportation, leaving the special contract out of view, appellant incurred the general liability of a common carrier. But what is the liability of a common carrier at common law? The rule as it is ordinarily stated is that a common carrier is liable for all losses except those occasioned by the act of God or the public enemy. The exception to this rule is broader than it is stated above, or, if not so, it has been extended by judicial opinion. The act of God or the public enemy is not the limit of the exemption from liability of the common carrier at common law. He was never liable, within the general rule, for losses or injuries produced by the nature and inherent character of the property, such as the ordinary and natural decay of fruit, vegetables, and other perishable articles, and the fermentation, evaporation, or unavoidable leakage of liquids. An injury inflicted upon a live animal by itself, without fault on the part of the carrier, or caused by other animals with which it is being shipped in the same car, comes within the reason and spirit of the exception to the rule of exemption from common-law liability, in its broader and true definition.

Animals, when being transported in a manner contrary to their habits and instincts, may injure or destroy themselves or each other notwithstanding every reasonable precaution may be used to prevent it. For such occurrences the carrier is not answerable. He is relieved from responsibility for casualties of this description if he shows that he has provided suitable means of transportation, and exercised that degree of care which the nature of the property requires. *Story, Bailm. §§ 492a, 576; Clarke v. Rochester & S. R. Co., 14 N. Y. 570; Great Western R. Co. v. Blower, 2 Moak, Eng. R. 700; Smith v. New Haven & N. R. Co., 12 Allen (Mass.), 531; Evans v. Fitchburg R. Co., 111 Mass. 142, Bamberg v. South Carolina R. Co., 9 S. Car. 61; East Tennessee, Va. & Ga. R. Co. v. Johnston, 75 Ala. 596, 22 Am. & Eng. R. Cas. 437.*

Judgment reversed and cause remanded.

Carriage of Live-stock—What are Injuries Resulting from Inherent Nature or Propensities of Animals.—See *Lindsley v. Chicago, M. & St. P. R. Co. (Minn.)*, 31 Am. & Eng. R. Cas. 86, note 91.

CHICAGO AND EASTERN ILLINOIS R. CO.

v.

KATZENBACH.

(Indiana Supreme Court, March 29, 1889).

Live-stock—Injuries during Transit—Agency—Authority to Effect Compromise.—Where the evidence is sufficient to prove that the defendant's general freight agent came to the place where a wreck had occurred, by the authority of and acting for the defendant, for the purpose of looking after the injured property, and adjusting claims for damages; that he knew the number of horses that were shipped in the car; and that he took charge of the injured horses, ordered them cared for and treated,—an agreement by which the company agreed to pay the plaintiff a sum in full for a mare injured in the wreck, the mare thereafter to be the company's property, is within the scope of the authority of the general freight agent, and is binding on the company.

Same—Validity—Consideration of Compromise.—An agreement by which a railroad company agrees to pay a sum in full of the damage to an animal injured while being transported over its line, the animal thereafter to become the property of the company is founded on sufficient consideration, viz: the liability of the company in damages, and the transfer of the plaintiff's right of property.

Same—Condition Limiting Recovery—Walver—Evidence of Compromise.—A stipulation in an agreement for the carriage of a mare that the damages recoverable for the carrier's negligence shall be limited to a specified sum may be waived by the parties, and it is not error in an action for damages to permit the introduction of testimony tending to prove an agreement by the railroad company to pay a larger sum in settlement of the plaintiff's claim.

APPEAL from Circuit Court, Vigo County.

Wm. Armstrong, W. H. Lyford, and L. D. Thomas for appellant.

McNutt, Davis & Davis for appellee.

OLDS, J.—This is an action for the value of a mare owned by the appellee and shipped by one C. L. Campbell over the appellant's railroad from the city of Terre Haute, Ind., to the city of Chicago, Ill., and injured and rendered worthless while in transit by a wreck on the railroad.

The complaint is in four paragraphs. The first alleges that in May, 1881, Campbell delivered to appellant one car-load of horses, consisting of seven head of horses, and received from appellant a stock contract, by which contract appellant agreed to deliver said car of horses to said Campbell, at Chicago, Ill., for

\$20,—said Campbell being consignor and consignee; that one of said horses, a mare, belonged to the plaintiff; that

Complaint.

Campbell acted as agent of plaintiff in the shipment; that said mare was of the value of \$1000; that appellant failed to deliver said mare, but crippled her in transit, making her wholly worthless, whereby plaintiff sustained damage to the amount of \$1000, and Campbell is made a party defendant to answer as to his interest.

The second paragraph alleges that Campbell, as plaintiff's agent, shipped in his own name plaintiff's mare from Terre Haute to Chicago, over the appellant's railroad; that appellant made a written agreement with Campbell, in consideration of \$20, to deliver said mare and six other horses to said Campbell at Chicago; that said contract is lost; that said mare was injured and rendered wholly worthless while in transit, and was never delivered to said Campbell, or any one else; that said mare was of the value of \$1000; that, on learning of said injuries, the plaintiff and Campbell at once notified said appellant that said mare was the property of the plaintiff and plaintiff demanded that said appellant pay said damages; whereupon said appellant agreed to and did settle with said plaintiff for the mare, said Campbell releasing said appellant from all claims in so far as he was concerned. And then and there, in June, 1881, said appellant agreed with said plaintiff to keep said mare as its own, and pay plaintiff in settlement therefor \$500, which contract was accepted by said plaintiff, and in pursuance therewith said plaintiff released all claims for damages and of title to said mare; that said appellant has kept said mare, but wholly failed to pay to plaintiff said sum so agreed upon, or any part thereof, though often requested so to do.

The third is a common count for one mare sold and delivered in June, 1881.

The fourth paragraph of complaint alleges that on May 18, 1881, Campbell, as plaintiff's agent, shipped in his own name, over appellant's road, one certain mare belonging to plaintiff, and appellant accepted said mare, together with other horses belonging to Campbell, and gave to Campbell a written agreement or bill of lading, wherein said appellant agreed, for a valuable consideration, to transport said mare and other horses, without injury, to the city of Chicago; that said agreement is lost; that said car was wrecked and said mare ruined in transit so as to be worthless; that said mare was a blooded mare, and very valuable, and worth \$1000; that said injuries were caused by said appellant running the trains and car in which said mare was being carried in a careless and negligent manner, and by use of defective cars and rolling stock and machinery, and the negligent employment of improper servants; that said injuries were caused

without any fault on the part of plaintiff, whereby plaintiff is damaged in the sum of \$1000.

Appellant filed separate demurrers to each paragraph of complaint, which were overruled, and exceptions reserved by appellant. Appellant then answered, in five paragraphs: First. In general denial. Second. Payment. The third avers that after the making of said contract, and after committing said suffered grievances, and before the bringing of this action, appellant delivered to appellee, and appellee accepted from said appellant, the railroad company, the sum of \$1250, in full satisfaction of all damages, liabilities, and debts mentioned in said complaint. The fourth answers the second and third paragraphs of complaint, and alleges that the promises and agreement set up in said paragraphs were without any consideration. The fifth answers the first, second, and fourth paragraphs of complaint, and admits the injury to the mare, together with other horses belonging to Campbell, but avers that said mare was fraudulently and surreptitiously put into appellant's car and train by plaintiff or his agent or Campbell, without knowledge or consent of appellant, without any bill of lading or stock contract, for the fraudulent purpose of having said mare transported free; and said mare was transported without any consideration, and was injured through fault of the plaintiff in thus fraudulently putting said mare in said car. Appellee replied to the answers by general denial. Trial by jury. Verdict and judgment for appellee for \$630. Motion for new trial by appellant. Motion overruled, and exceptions by appellant.

It is contended that the evidence does not support the verdict; that the evidence does not show that Robert Forsyth made the contract on the part of appellant to pay \$500 for the mare; and that if he did make such contract he had no authority to make such contract, and it would not be binding upon the appellant company; and that it was without any consideration. It is sufficient to say there is evidence tending to prove, and from which the jury may have found, that Col. Robert Forsyth was the appellant's general freight agent, and that immediately after the wreck Col. Forsyth came to the place where the wreck occurred, by the authority of and acting for the appellant, for the purpose of looking after the injured property, and adjusting claims for damages; that the appellant's agent knew the number of horses that were shipped in the car; that Col. Forsyth took charge of the injured horses, ordered them cared for and treated, adjusted the claim for damages to the other horses, and agreed upon the terms of settlement for this mare of the appellee; that he agreed on the part of appellant to take the mare, and to pay the appellee \$500 in settlement of appellee's claim, and that the injury occurred

Power of general freight agent to compromise.

by reason of defects in the cars, and negligence on the part of the appellant in using and running defective cars; that Col. Forsyth acted within his authority in adjusting and agreeing upon the terms of settlement with appellee. The theory that there was no consideration for the agreement certainly is not tenable. The evidence tended to prove the mare to be a very valuable animal, and that she was injured by the negligence of the appellant, which would make the appellant liable for the damages occurring by reason of appellant's negligence. That of itself would be a sufficient consideration, but in addition to that appellee gave up his right and ownership to the mare to appellant, and appellant accepted and became the owner of her. The contract was one within the power of the company to make. A railroad company has the right, in adjusting injury to property caused by its negligence, to contract to keep the injured property, and pay the owner its value in settlement of the damages.

It is contended that by the terms of the bill of lading the damages recovered by the appellee were limited to \$150. If the

**Stipulation
limiting re-
covery.**

contract did so limit the damages to be recovered in case of injury, that stipulation in the contract was one which might be waived by the parties to it, and would be waived by settlement of the damages resulting by the negligence of appellant railroad company agreeing to take, and taking, the injured mare, and agreeing to pay a larger sum.

It is contended that the court erred in the admission of evidence of the value of the mare at Terre Haute, at the time she was placed on board the cars. The bill of lading in evidence contains an express provision that in case of injury the value of the stock at the place and date of shipment shall govern the settlement, and, taking into consideration the quality of the animal, her value for speed and breeding, and the accessibility to that market, the evidence might be proper in showing the value of the mare at the time and place of the injury, and, for aught that appears in the record, such evidence was admissible under the issues in the case.

**Evidence as to
value of mare.**

The next error assigned is the giving and refusing of improper instructions. We do not deem it proper to extend this opinion by setting out the instructions given and refused, which are complained of. We have carefully examined the instructions, and the objection urged to each. We do not think there was any error in the giving or refusing of the instructions for which the case ought to be reversed. These are the only questions discussed by counsel, and there is no error in the record for which the judgment ought to be reversed.

Judgment affirmed, with costs.

FLUKER

v.

GEORGIA RAILROAD AND BANKING CO.

(Georgia Supreme Court, January 21, 1889.)

Depot Grounds—Control Over—Power to Exclude Public—Sale of Lunches.—The dominion of a railroad corporation over its trains, tracks, and "right of way" is no less complete or exclusive than that which every owner has over his own property. Hence the corporation may exclude whom it pleases, when they come to transact their own private business with passengers or other third persons, and admit whom it pleases, when they come to transact such business. This applies to selling lunches to or soliciting orders from passengers for the sale of lunches.

Same—Implied License to Third Party—Revocation—Notice.—A mere implied license, no matter how long enjoyed, to transact such business, for which no consideration has been paid, is revocable at any time, and such revocation results from notice not to prosecute the business in the future.

Same—Revocation—Expulsion from Grounds—Use of Force.—One who persists in using the license, after notice of its termination, may be prevented from so doing by such force, not extending to life or limb, as may be necessary to effectuate his expulsion from the premises.

Master and Servant—Acts of Licensee—Liability of Company.—A lessee or licensee of the exclusive privilege of entering the cars or upon the right of way to sell or supply lunches, is not a servant or agent of the corporation, so as to render it liable for an assault, or an assault and battery, committed by such lessee or licensee upon a competitor who seeks lawfully, on his own premises, to obtain the patronage of passengers.

Same—Assault on Servant—Loss of Service.—A master has no right of action for an assault, or an assault and battery, upon his servant, unless some loss of service or capacity to serve results therefrom.

ERROR from Superior Court, Greene County.

H. F. & H. G. Lewis for plaintiff in error.

J. B. Cumming and *J. A. Billups* for defendant in error.

BLECKLEY, C.J.—The plaintiff had for some nine years, without objection on the part of the company, exercised the privilege of coming upon the right of way, and dealing with passengers by supplying them with lunches. A part of the time he had even used the platform of the company for this purpose, and perhaps also had been allowed to enter the cars. The privilege, except as to coming upon the right of way, was revoked some four years previously to October, 1886.

Facts.

On the 10th of said October the plaintiff received notice to cease the exercise of the privilege as to the right of way, and was also informed that the exclusive right of serving lunches to passengers had been leased by the company to one Hart. About a week after receiving this notice the plaintiff's servant was on two or three occasions expelled from the right of way by a servant of the company, and in one instance the company's servant, in controlling the action of the plaintiff's servant, did not desist where the right of way stopped, but conducted the intruder across the public street, and up to the plaintiff's door. The plaintiff, seeing that he could not carry on his business through the medium of a servant, undertook to conduct it himself, and he also was expelled; both Hart and the defendant's servant co-operating in his expulsion, and Hart, but not the servant, continuing the use of force beyond the right of way, and into the public street. The plaintiff, after this, undertook to advertise his business by ringing a bell in the street in front of his premises, and Hart alone interfered with that, and committed an assault upon him in the street. For these grievances he brought his action against the company. The case was tried and the court granted a nonsuit.

1. It is contended that the company has no such exclusive dominion over the tracks and spaces embraced in its right of way as to entitle it to exclude therefrom any person entering thereon in an orderly manner, and upon lawful business; and especially that it cannot discriminate against one person and in favor of another.

Power of company to exclude from depot.

We have discovered no authority for this position, either in its more limited or more extended form. On the contrary, it would seem that the very nature of property involves a right of exclusive dominion over it in the owner. We cannot believe that there is a sort of right of common lodged in the public at large to enter upon lands on which railroads are located, and over which they have secured the right of way. Such lands the railroad companies may inclose by fences if they choose to do so, and exclude any and all persons whomsoever. Their dominion over the same is no less or exclusive than that which every owner has over his property. If they do not choose to erect fences and make inclosures, they may, by mere orders, keep off intruders, and they may treat as intruders all who come to transact their own business with passengers, or with persons other than the companies themselves. To do this, however, they must give fair notice; inasmuch as by a sort of common law or common understanding in this country an unforbidden entry on uninclosed lands is not a trespass, unless the intruder comes for some improper purpose, or to remain an undue or unnecessary length of time. It is manifest that the grant of the

privilege to one or more is no rightful cause of complaint on the part of others to whom a like privilege is denied. The right to make such discriminations is incident to the ownership of all property which is not devoted to some use that in and of itself involves an invitation to the public to enter and enjoy for the time being. The business of selling lunches to passengers, or of soliciting from them orders for the same, is not one which every citizen has the right to engage in upon the tracks and premises of a railway company, and consequently those who do engage in it and carry it on must be dependent upon the company for the privilege. And whether the permission, when granted, be called a lease or a license, makes no difference; nor does it make any difference, except in the matter of revocation, whether the grant be gratuitous, or made for a consideration. *Barney v. Oyster Bay, etc., Steamboat Co.*, 67 N. Y. 301; *Landrigan v. State*, 31 Ark. 50; *Hazen v. Boston & M. R. Co.*, 2 Gray (Mass.), 577; *Railroad Co. v. Philadelphia*, 88 Pa. St. 424; *Sweeney v. Boston & A. R. Co.*, 128 Mass. 5, 1 Am. & Eng. R. Cas. 138; *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364; *Keller v. Dillon*, 26 Ga. 701.

2. That the company allowed the plaintiff to sell his lunches upon its right of way for a long space of time, say nine years, without objection, gave him no right to the privilege in perpetuity. He paid the company no consideration, but enjoyed a mere implied license, which was revocable at any time; certainly so after given him reasonable notice. In this instance, he had notice for about one week before any decisive steps were taken to put a stop to his dealings. He refused to yield to the notice, and, for that reason alone a resort to force on the part of the company was had. There can be no doubt that such a license could be terminated by notice. 1 Washb. Real Prop. 400; 3 Kent. Comm. 452, 453; *Parish v. Kaspere*, 109 Ind. 586; *Wingard v. Tift*, 24 Ga. 179; *Colcord v. Carr*, 77 Ga. 106; *Cook v. Pridgen*, 45 Ga. 341; *Mayor v. Franklin*, 12 Ga. 239; *Sheffield v. Collier*, 3 Ga. 82.

Implied license may be revoked.

3. The force used by the company's servant was of a mild and gentle character; certainly so as against the plaintiff himself. Not only was no violence done to life or member, but not even was the plaintiff treated rudely; and the company's servant desisted before the plaintiff had withdrawn beyond the right of way. A far greater degree of force than that used would have been justifiable, had the plaintiff rendered it necessary in order for his expulsion to be accomplished. *Wood v. Leadbitter*, 13 Mees. & W. 838.

Degree of force used.

4. For the violence of Hart, the lessee or licensee of the privi-

lege, the company is not responsible. He was not acting as a servant of the company, but in his own behalf; and although the company, by its servant, co-operated with him in the beginning, that co-operation ceased before Hart had transcended the limits of his own rights. If Hart pursued the plaintiff into or upon the street, he alone is responsible. The company's servant declined to take part in that proceeding, but confined himself and his action to the company's premises. This same distinction applies to Hart's interference with ringing the bell in front of the plaintiff's premises on the street. Hart alone undertook to deal with the plaintiff for using the bell, and, so far as appears, no servant of the company was even present on that occasion. His conduct then and there certainly affords no cause of action against the company.

5. It does appear, however, that the company's servant, although he did not chase the plaintiff beyond the right of way, pushed the matter further in dealing with the plaintiff's servant. He not only forced him off the right of way, but across the street and to the plaintiff's door. This may give a cause of action to the servant, but it furnishes none to the plaintiff, because there was no loss of service, nor any impairment of capacity to render service; and, for a master to have a right of action for an assault and battery committed upon his servant, one or both of these consequences must ensue. Robert Mary's Case, 9 Coke, 113 *a*; Wood, Mast. & Serv. § 224; Bigelow, Torts, 108, 109; 1 Minor, Inst. 224, and authorities cited.

Judgment affirmed.

OLD COLONY R. CO.

v.

SLAVENS *et al.*

(Massachusetts Supreme Judicial Court, January 4, 1889.)

Negligence—Mail Carriers—Indemnity—Joint Tort-feasors.—Where the contractors for the transportation of the mails negligently unload the mailbags upon the station-platform or sidewalk in such a manner as to cause injury to one who recovers judgment therefor against the company, the company may maintain an action for indemnity against the contractors, the relation of the parties *inter se* not being that of joint tort-feasors.

ON exceptions from Superior Court, Suffolk County.

Tort by the Old Colony R. Co. against H. C. Slavens and

another to recover the amount of a judgment rendered against the plaintiff in favor of G. W. Amory, and paid by the plaintiff to him. A servant of the defendants, who were contractors for the removal of the United States mails from plaintiff's station, negligently unloaded a number of mail bags in such a manner that they became an obstruction to the sidewalk or platform, and caused personal injuries to Amory. Amory having brought a suit against the railroad company, the latter notified the defendants thereof, called upon them to defend the same, and also intimated that, if they failed to do so, the defence of the suit would be conducted at their expense. Judgment having been rendered in Amory's favor, plaintiff paid it. At the trial in the superior court plaintiff recovered a verdict, and the defendants excepted.

Patton & Blair for defendants.

J. H. Benton, Jr., for plaintiff.

C. ALLEN, J.—The verdict establishes it as a fact that the defendants might have done the work of transferring and loading the mail-bags without obstructing the sidewalk as it was obstructed on the occasion of the injury to Amory. The plaintiff's regulations and provisions did not require such obstruction, and the only question before us is whether, assuming this as a fact, the plaintiff was entitled to recover; and we think the plaintiff and the defendants were not, as to each other, *in pari delicto*. The plaintiff was held liable to Amory, because bound to keep the sidewalk reasonably safe. But the ground of the present action is that the defendants, by their negligent act, exposed the plaintiff to this liability. The plaintiff's neglect to keep the sidewalk safe did not make the plaintiff a joint wrong-doer with the defendants in any such sense as to prevent the plaintiff from recovering. *Churchill v. Holt*, 131 Mass. 67, 127 Mass. 165; *Gray v. Boston Gas-light Co.*, 114 Mass. 149; *Woburn v. Boston & L. R. Co.*, 109 Mass. 283; *West Boylston v. Mason*, 102 Mass. 341; *Milford v. Holbrook*, 9 Allen (Mass.), 17, 23.

Exceptions overruled.

Facts.

Plaintiff entitled to indemnity, not being joint tort-feasor.

In re KINGS COUNTY ELEVATED RAILROAD.*(New York Court of Appeals, January 15, 1889.)*

Elevated Railroad—New York Rapid Transit Act—Commissioners' Plan—Number of Tracks.—A plan adopted by railroad commissioners appointed under the New York Rapid Transit Act of 1875, pursuant to the provision of that act which requires them to decide upon the plans for the construction of elevated railways, which limits the number of tracks to be constructed to two, is sufficient, although it does not in terms command the construction of two tracks.

Same—Erection of Columns.—When such plan provides that in wide streets the company may erect the columns in the street, and not on the line of each curb, but makes provision so far as possible for the varying width of the streets, and the surface lines already constructed therein, it sufficiently complies with the requirements of the Rapid Transit Act.

Same—Height of Track—Minimum Height.—It is not essential that the plans should prescribe a fixed height at which the elevated railroad should be erected, a provision fixing the minimum height being sufficient.

Same—Location of Stations.—In such plan it is not requisite, notwithstanding the provision of the Rapid Transit Act that commissioners shall decide upon the plans for the construction of the road with the necessary "landing places, stations, buildings, platforms, stairways," etc., that the plan adopted by the commissioners should fix the precise number and exact locality of stations and stairways. If the articles prescribe that the stations shall be not more than a certain number of blocks apart, the location is sufficient.

APPEAL from General Term of the Supreme Court, Second Department.

Appeal from order of the general term confirming the report of the commissioners approving of plans for the construction of the Kings County Elevated Railroad under section 5 of the New York Rapid Transit Act (N. Y. Laws 1875, ch. 606), which enacts:

"The said commissioners having, by such public notice as they may deem most proper and effective, under such conditions and with such inducements as to them may seem most expedient, invited the submission of plans for the construction and operation of such railway or railways, the said commissioners shall meet at a place and upon a day in such public notice named, not more than ninety days after their organization, and decide upon the plan or plans for the construction of such railway or railways, with the necessary supports, turnouts, switches, sidings, connections, landing-places, stations, buildings, platforms, stair-

ways, elevators, telegraph and signal devices, or other requisite appliances upon the route or routes, and in the location determined by them."

Wm. J. Gaynor for appellant.

Leslie W. Russell for respondent.

FINCH, J.—At the threshold of this case stands a question which is alleged to supply a perfect barrier to the attack made upon the corporate life of the company which in this proceeding seeks to condemn property for the public use. That question concerns the force and effect of a judgment rendered in an action brought in the name of the people, by their attorney general, against the corporation, and which adjudged the lawful organization of the Kings County Elevated R. Co. and its right to continue to exist. We pass by that question without discussing or determining it, although fully appreciating its importance and interest, because we have reached a conclusion upon the merits of the controversy which makes the possible protection of that judgment unessential, and desire to free our own previous adjudications from inferences stretching seriously beyond what was intended at the time, and what is warranted by the decision actually made.

Four separate and distinct grounds are asserted by the land-owners defending this proceeding upon which it is claimed we should decide that the moving corporation never became such in fact, and all of these respect the manner in which the commissioners under the rapid transit act performed their duties, and the sufficiency of the plan which they formulated for the construction of the road. One of these grounds relates to the provision limiting the number of tracks permitted to be laid. The sixth subdivision of the general plan adopted by the commissioners reads thus: "There shall not be more than two rows of columns, or more than two tracks, in any one street or avenue, or public place, except as hereinafter authorized." No wider or different authority was afterwards given, and the provision limits the company to two tracks, but does not in express terms direct the construction of two, and that is the criticism now made upon the sufficiency of the plan, as it respects the tracks.

Plan sufficient
if it simply
limits number
of tracks.

It is first to be observed that no such question was raised in, or decided by, the New York Cable Co. Case, 104 N. Y. 1, upon which these appellants principally rely. The defect there was that no limitation was put upon the number of tracks which the company might build, and it was left in possession of the power to occupy the whole width of the roadway with its rails and trains, and no property owner could know in advance how grave or slight would be the resultant interference with the street. That

difficulty does not here exist. The number of tracks is limited to two, and occupation of the street beyond that is restrained. But it is a new defect which is suggested, and consists of an omission to command the construction of two tracks, and leaving the company at liberty to lay but one. Some things, however, the commissioners could safely assume. They were placed in position to guard the public against injuries or encroachments which the interest of the company might lead its managers to attempt, and were bound to protect the right of the people at every such point. Consistently with that duty they could safely and prudently omit details which the interests of the company would be certain to supply. I do not think that any one would have imagined that a corporation would seek to run a rapid transit elevated road through a large city upon a single track, or that there was danger of such a mistake against which precaution was needed. The numerous stations, comparatively near together, would require side tracks for the frequent trains to pass, with an expensive accumulation of switches and of men to operate and guard them, and when completed little more of rails would be needed to make the track double, with a vast increase to the company of its capacity to run frequent trains, and of safety to its own equipment. The danger was not at all that the company would not build two tracks,—its own obvious necessities would provide for that,—but the temptation might come with increase of population and growth of business to add more, and so affect injuriously the public right. Against that peril the commissioners guarded, and assumed, as they very well might, that there could be no possible temptation on the part of the company to run their road with a single track. Indeed, that assumption rises almost, if not quite, to the level of a command, for the commissioners repeatedly speak of transverse girders carrying the tracks, and never describe a single track, except in connection with two rows of columns, each row carrying its own. And more specifically, when providing an alternate plan for wide streets, they prescribe the distance between the centre lines of “the two tracks,” plainly contemplating them as involved in the plan of construction; and so we are quite certain that the omission pointed out does not in fact exist, or, if it does, constitutes no defect in the commissioners’ plan.

Another alleged fault respects the alternative plans provided for streets exceeding 42 feet in width. It was first required that in the streets of that width or less there should be a row of columns on each curb, and a super-structure carrying the tracks upon transverse girders spanning the street. With that requirement no fault is found. But in streets more than 42 feet wide the company were given an alternative. They were permitted to build upon the

Erection of
columns in
wide streets.

plan devised for the narrower streets, but, as it was obvious that a roadway might be so broad as to make the transverse girders, stretching from curb to curb without intermediate support, dangerous and unfit, an alternative plan was provided to avoid the difficulty. That was two rows of columns, not on the line of the curb, but in the roadway carrying the tracks upon transverse girders, or each row carrying its own track separately. The point of the criticism upon this alternative is that it does not locate the columns in the roadway, or their distance from the curb. But that distance would vary with the varying widths of the streets, and directions are given as nearly as possible outside of the details of an engineer's specifications. The articles forbid columns between the tracks of surface railways where they are less than five feet apart. On Fulton and Washington streets, Myrtle, Lexington, and Nostrand avenues, the distance between the two tracks, measuring from the centre line of each, is not to exceed 18 ft., and each track is to be equidistant from the centre line of the street. Where columns are to be put in the roadway on each side of a surface railroad track, the transverse distance between the columns is to be at least 21 feet in the clear. It is thus apparent that in wide streets, where the columns were to stand in the roadway, their location was dictated so far as was deemed necessary. Greater precision would have been needless, and as likely to result in injury as benefit. We said in the New York Cable Co. Case that the accuracy and detail of building specifications was not requisite to the validity of the commissioners' plan, and that the line between essentials and non-essentials was not easy to draw. In the present instance we think the further details insisted on involve a degree of minuteness and precision not requisite to the end in view, and that the alternative plan for wide streets was sufficient, and a substantial compliance with the law.

We have now reached the two remaining objections which were the subject of comment in the New York Cable Co. Case, and for that reason are now said to be conclusive upon us. It seems to me very plain that such an inference from the doctrine of that case is entirely unwarranted by the terms of the decision. It was stated in the opinion that there was some degree of disagreement among us, and not a concurrence in all respects; and so five propositions were formulated as the result of the opinion, and upon which the court acted, and concurrence in the propositions did not involve a necessary indorsement of all the reasons urged in their support. In the fifth proposition the whole court concurred, and do still concur. That was, as stated in the opinion, that the action of the commissioners was not "a substantial compliance" with the requirements of section 5 of the rapid transit act. We have not the least disposition to

recede from or question or modify that proposition. It rested upon at least two omissions of the most important and vital character: One, that it was left undetermined for 17 miles of the routes authorized whether the construction should be a surface or an elevated road,—an omission properly characterized in the opinion as a flagrant violation of the statute; and the other, that the number of tracks was left unlimited, so that the whole width of the roadway might be occupied by them, and in some streets even a third row of columns might be erected. These facts alone established that no definite plan was dictated by the commissioners, but the choice of a plan was substantially left to the corporators. To these essential and palpable defects were added two others, not as in and of themselves so vital and important as alone sufficient to invalidate the action of the commissioners, for no such doctrine is asserted, but as further and added illustrations of the defectiveness of the proposed plan considered in its entirety as such. These were a failure to fix definitely the height of the structure, except that it should not be less than 14 feet; and an omission to locate the stations, and the stairways leading to them. The opinion treated these omissions as defects; the decision did not necessarily involve that concession, or hamper the freedom of the court. But, if it did, the question would still remain whether the two omissions are of such importance and so vital that a plan complete and perfect in all other respects must be deemed for those defects alone a failure to substantially comply with the rapid transit act. To that question, which is the one here presented, and which the New York Cable Co. Case did not assume to decide, we must now direct our attention.

I do not regard the omission to prescribe the fixed height of the structure as a defect at all, but, if it be one, it is certainly of so slight and unimportant a character as not to justify a condemnation of the plan adopted, with the consequence of destroying the corporate life founded upon it. In settling the details of that plan it must have been obvious to the commissioners that the danger to the public welfare and convenience was not that the structure would be too high, but too low. Every foot of increased height would involve so much of additional expense in both material and labor, and in the inevitable necessity of heavier columns and girders, and further means of securing stability and safety. In addition to that, the height of the structure above the surface, necessitating stairways up which the passenger must ascend, is in itself a disagreeable consequence of the system which no company would be likely to make worse at a needless increase of cost. On the contrary, the temptation would be to build as little above the surface as would at all

Plan only requires to prescribe minimum height.

answer, and the danger to be apprehended was not one requiring restraint in an upward direction. Such restraint might reasonably be deemed unnecessary as a prudent element of the plan devised, and indeed might produce serious evil, and hamper and mutilate the general design, rather than improve it. Of course the builders of the track would aim to make it level, or depart from that effort only by moderate grades, and any plan made in advance would show varying heights above the surface, dependent upon the conformation of that surface, and the consequent grades. The prudent and proper height would therefore largely depend upon these grades, and of necessity be variable and irregular. It could not be fixed except as the result of an accurate survey and profile, and by the precise figures of an engineer dictating the details of construction. It was not within the duty of the commissioners thus to establish permanently the grades of the road. So much minuteness and accuracy was not intended to be imposed, and the only danger to be apprehended was provided for in the provision which fixed the minimum of height. The omission to go further cannot justly be deemed a material defect in the plan, and that quite certainly would have been our conclusion in the New York Cable Co. Case had its fate hung upon that one omission, or its solitary existence challenged a specific consideration.

There remains, therefore, but a single defect in the plan formulated by the rapid transit commissioners upon which the appellants have relied; that is, the omission to fix the specific locations of the stations and stairways. Of this omission the opinion in the New York Cable Co. Case declared that it gave the company power to erect stations over the sidewalks and cross-streets, and to occupy as much of the sidewalks as it might deem necessary for stairways or approaches, without any restriction. The opinion, also, seems to assume that section 5 of the rapid transit act required a location of such stations and stairways. I think that assumption was an error which would not have been made had specific attention been drawn to the language of the statute. If that section compels the location of stations and stairways, it equally compels that of every column or "necessary support," of every turnout or siding, of every connection, of every landing place and platform, and of every telegraph and signal device. Certainly that was not the meaning or purport of the section. These details were mentioned as incidents of the railroad, and as included and embraced within it as such, and the meaning of the section is that the commissioners must decide upon the plan or plans of the railroad, with its specified incidents, upon the routes and in the locations determined by them. It does not follow, however, that the opinion in the New York Cable Co.'s

Location of
stations and
stairways.

Case was erroneous in holding that some general location of the stations was within the duty of the commissioners. Such action as an element and detail of the plan might very properly, in the interest of the public, have been made and included in the conditions imposed. The interest of the company might not in all respects coincide with that of the people, and it might build fewer stations, and further apart, or in more unfitting localities, than the public convenience required. We cannot, therefore, say that the omission was not a defect; and we are thus compelled to take the measure of its importance, and determine whether by itself, and standing alone, it should prevent a judgment of substantial compliance. Of course it was not necessary to direct that stations should be built, for without them no capital would construct the road, nor to say that in the main, and as a general rule, they should be built at the cross-streets, for the interest of the company and of the public would concur in that. Wherever built they would occupy space in the air above the streets, and their stairways spring from the sidewalks. Such consequent occupation of street and sidewalk was contemplated by the act, and inseparable from that element of the plan which dictated an elevated, instead of a surface, road. The defect, therefore, accurately measured, respects simply the number and localities of the stations. I do not think it was requisite to fix the precise number of all, and exact locality of each; but if the articles had prescribed that the stations should be not more than a certain number of blocks apart, and not less than a certain other number of blocks apart, so as to prevent either too many stations on the one hand, or too few on the other, that would have been a sufficient location. We see, therefore, the true character and measure of the omission. It is not at all vital, or even serious; for the company could not operate its road without stations at which to receive and discharge passengers. The sharp rivalry of the surface roads would tend to make them sufficiently frequent and convenient, and no very serious or appreciable injury could reasonably be apprehended from an omission to dictate locations in some general way. The property owners called upon for their consent would understand that stations were requisite, and each would know that one might come in his own locality. He could refuse for that reason, although experience has taught the lesson that such stations are often a benefit, rather than an injury, to the business property in their immediate vicinity. If, in the New York Cable Co. Case the omission as to stations had been the sole and only defect in the commissioners' action, I am confident that the learned and lamented judge who wrote the opinion, and the court which concurred with him, would not have denied the corporate existence. Such a result, standing

upon a single ground, so narrow and relatively unimportant, would not have been justified, and is not within the scope and spirit of the decision. That question, not then presented, is before us now, and I do not hesitate to conclude that in the case at bar the action of the commissioners was a substantial compliance with the law, notwithstanding the omission under consideration. All through the opinion in the New York Cable Co. Case runs the concession that not a detailed and precise and rigid compliance is to be exacted, but one which, looking over the whole action taken, is substantial, and does fair justice to the purpose and aim of the law. Substantial compliance involves the admission that there has not been exact and perfect compliance, and that there are minor defects and omissions. The single one here existing seems to us of that character, and not sufficient, standing alone, to require us to deny the corporate existence.

The questions thus discussed were not presented *In re Kings County El. R. Co.*, 105 N. Y. 97, but those there considered, with a single exception, related to an alleged forfeiture of the rights acquired, and a failure to secure the necessary consent. The corporate existence of the company was there asserted and maintained against the objections then presented.

The order should be affirmed, with costs.

All concur; EARL and GRAY, JJ., on the ground that the case of *In re Kings County El. R. Co.*, 82 N. Y. 95, is conclusive here. It was a proceeding *in rem*, instituted by the state, and its determination established the legality of the corporate existence of that company, and it could not be disputed collaterally thereafter.

PEOPLE *ex rel.* THIRD AVENUE R. CO.

v.

NEWTON, Commissioner.

(*New York Court of Appeals, February 8, 1889.*)

Horse Railroad—Charter—Easement in Street—Change—Cable Railway.
—A corporation organized under the New York general railroad act (Laws 1850, c. 140) was authorized by a city "to lay a double track for a railroad" in certain streets, upon condition that it should keep in good repair the space between the tracks, and a space on each side of the same; and that the tracks should be laid upon a good foundation, with a rail even with the surface of the streets. Pursuant to this authority, a horse railway was constructed and operated for many years. *Held*, that the author-

ity conferred upon the company by the city did not authorize to open up the streets for the purpose of constructing a cable railroad in place of the horse railway.

APPEAL from General Term of the Supreme Court, First Department.

Application by the relator, the Third Avenue R. Co., to the supreme court at special term for a writ of *mandamus* to John Newton, commissioner of public works of the city of New York, directing him to grant a permit to the relator authorizing it to make excavations for the purpose of constructing a cable railroad. The writ was granted at the special term, but, upon appeal, the general term reversed the order and dismissed the application. The relator thereupon took the present appeal.

John E. Parsons for appellant.

James C. Carter for respondent.

DANFORTH, J.—It is not essential to a proper treatment of this appeal to determine whether the relator is tied down to a particular method of operating its road, whether its cars may be drawn or propelled, nor whether, if motion is to be given by traction, the pulling shall be done by horses, as at present, or by some other power, animal, mechanical, or vaporous. These questions admit of much argument, and possibly some doubt.

But if it should be conceded that its cars may be towed by cable, we should be as far from the solution of the controversy between the parties as if we had not been appealed to. It is our province to determine whether a public officer has mistaken his duty in omitting to obey the direction of a private corporation in regard to the management of streets intrusted to his care, and whether the court below, in refusing to vindicate the corporation, has misconstrued the grant by which the relator obtained the franchise under which it seeks to justify this application. The governing principles in such a case are: (1) The relator must show a clear legal right to the writ. *Mort-horst v. New York C. & H. R. R. Co.*, 66 N. Y. 609; *People v. Wendell*, 71 N. Y. 171. (2) Whether it is entitled to have the thing done, may be inquired into both by the party moved against, and by the tribunal applied to. *People v. Appraisers*, 73 N. Y. 443. (3) The terms of the grant conferring the right which is asserted are to be strictly construed, and the privileges it confers cannot be extended by inference. If there is any ambiguity it must operate against the company; the general rule being that the grant shall be construed most strongly against the party claiming under it, and every reasonable doubt

Power of com-
pany to use
cable power
not involved
in case.

resolved adversely to it. Nothing is to be taken as conceded but what is given in unmistakable terms; and, as was said in *Langdon v. Mayor, etc., of City of New York*, 93 N. Y. 145, 4 Am. & Eng. Corp. Cas. 450, "Whatever is not unequivocally granted is deemed to be withheld," nothing passing by implication. The affirmative must be shown. The court is not to search for any hidden meaning. *Auburn & C. Plank Road Co. v. Douglass*, 9 N. Y. 444; *Langdon v. Mayor, etc., of City of New York*, *supra*. And, coming directly to the case in hand, "whenever it has been considered necessary or proper to allow a highway or street to be used to any extent for the purpose of a railroad, the right has been conferred in express terms" (*Davis v. Mayor, etc., of City of New York*, 14 N. Y. 519); and it is well settled that without legislative authority a railroad corporation has no right to interfere with any public road or street.

In the present case the relator's claim, as described in its petition, stands upon a resolution of the aldermen of the city of New York, passed on the 18th day of December, 1852, and called by the relator the "Van Schaik Grant," by which privileges were conferred on the relator's assignors, and afterwards confirmed and made effective, as it is claimed, by the legislature. Laws 1854, c. 140; Laws 1860, c. 10. The relator was incorporated in 1853, under the general railroad act (Laws 1850, c. 140), and thereafter received, by assignment from the persons named in the resolution, the grant which, as the petition asserts, "constitutes its right to own and operate a railroad" over the route in question. Its franchise of being a corporation, therefore, was derived from the act of 1850, and its powers and privileges as such are limited to those defined in that act and the resolution already referred to. By the resolution it was authorized "to lay a double track for a railroad" in certain streets in the city of New York, under the direction of the street commissioner, upon condition, among others, that it should keep in good repair the space between the tracks, and a space two feet each side of the same in each street in which the rails are laid, and also that the tracks be laid upon a good foundation, with a rail even with the surface of the streets; portions of the road to be completed within a time specified, and a certain other portion "as fast as the Third avenue should be graded and in a proper condition to lay rails thereon." There was a further condition that "no steam-power be used on any part of the road for propelling cars." The relator, in 1853, and immediately on receiving this grant, complied with its conditions, and laid its rails upon the surface of the streets through which it was authorized to operate, and adopted the system of traction by horses as a means of furnishing motive power for

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the running of its cars, and has in that manner continuously operated its road to the present time. It is obvious that the charter, as thus analyzed, contemplates only a road whose operations by way of structure or otherwise shall be limited to the surface of the roadway. It gives no right to open, or excavate, or use below its existing surface. The general railroad law (Laws 1850, c. 140) gives no authority for the construction of street railroads (section 28, subd. 5); but, if any right is gained by an organization under that act, the company is by its provisions required after construction to restore the street touched by them "to its former state, or to such state as not unnecessarily to have impaired its usefulness." The only disturbance of the street, therefore, which is allowed by the charter or the statute is the temporary excavation required for imbedding the ties and stringers which support the track and rails, and, when they are put in place, the work of restoration leaves the surface of the street unbroken, the passage-way even, and the substructure solid. Such is the road which the relator is authorized to construct, and which it did construct. In February, 1887, however, with no additional power or grant from the legislature or the municipal authorities, it resolved, in the language of its directors, "to adopt, and," as they say, "did adopt, the cable system as a means of furnishing a motive power for the operation and running of cars along its route." We are not informed of the component parts of that system. But the relator in order to carry forward its scheme, as disclosed by the action of its directors, demanded from the commissioner a permit, as something to which it was of right entitled, to make immediate excavations in and at frequent intervals of space across the public streets through its entire route. No license or word of permission to do so can be found in the charter. The road was completed. The relator had then no right to again disturb the surface of the streets except for necessary repairs and replacing of its ties and rails as occasion might require for the proper maintenance of its road. That power it had. No more. It now, however, asserts a legal right to make excavations, not for any of the purposes of its track or roadway, or the foundation of either, but for the purpose of laying a cable in each track between the present rails as motive power for its cars by the agency of steam from stationary engines. A mere statement of the proposition should be a sufficient answer to the claim. To open a city street for the construction of a surface railroad track, or its reparation, and to open that street for the introduction of a power to operate the road, would seem to be separate and distinct things. In the first, the excavation ends with the construction; the material of the street is replaced, or, in lieu of it, some other substance,

which restores the surface to its original unbroken condition and usefulness, and leaves all below the surface to such uses as the municipality may require. In the other case, as the record discloses, the cable requires a conduit of mason-work, the necessary excavation for which, on a straight stretch of road, without curves, is six feet wide and from four to five feet deep. Where there is a double track there must be two of these trenches, and at intervals of 35 feet along the whole distance they must go still deeper for drainage; and, where there are curves, the width of the excavation must be at least from 12 to 15 feet; at a corner the pit will be 30 feet in width; and at the engine-houses, whence the cable extends to the conduit in the street, it will be necessary to excavate the entire street from the engine-room out to and beyond the track furthest from it. None of these things are required for the construction of a street surface railroad, none of them pertain even to its operation. They relate to some act or thing to be done below the surface. Moreover, the entire surface is never to be restored; a slot opening from one half to five eighths of an inch will remain through the entire length of each track,—an opening sufficient to receive the calk of a horse-shoe and be the occasion of injury; to receive water and communicate frost to the water or gas-pipes or other pipes in the neighborhood of the trenches. Other consequences follow. It is enough, however, that the slot furnishes an obstruction to the usual and ordinary use of the street for traffic and travel, whether the horse moves along or across the track, as he may lawfully do.

In the case of *People v. Com. of Public Works*, 98 N. Y. 6, we held that no interference with the streets of the city, however slight, could be allowed in the absence of unmistakable language from the legislature permitting it. Yet it is the privilege of interference by excavation in those streets in the manner I have described which the relator claims as a right. It alone was the subject of its application to the commissioner, and his refusal to suffer it is the only ground upon which the writ of *mandamus* was invoked, and if this appeal succeeds the only command which can follow is that the relator be permitted to go on and make that excavation. There is no other question at issue. The city has as much and the same right to deny this use of its streets as a private owner would have to dispute the use of his property. *Brooklyn Steam Transit Co. v. City of Brooklyn*, 78 N. Y. 524. Whence, then, does the relator derive the reason for its contention?

Legislative authority required to authorize interference with streets.

I have examined with the greatest interest and care the elaborate, and upon other points instructive, brief of the learned counsel for the relator, but find nothing in it to answer the question

I am now considering, and which was forcibly presented by the learned judge at general term, and in the most explicit terms in behalf of the respondent upon this appeal. We are referred to no express words conferring the power sought to be exercised, nor to any words in the grant or the act of 1850, from which, if the law permitted it, an inference to that effect could be drawn by the exercise of the greatest ingenuity. On the contrary, every word and condition is against it. I do not think that the general railroad act (Laws 1850, c. 140) has any application to the relator's road. If it had, it is difficult to see any reason for the provisions of the act of 1854 (chapter 140) relative to the construction of railroads in cities, or the act of 1860 (chapter 10) relative to railroads in the city of New York, or many subsequent ones relating to the same matter. But assuming that it does apply, we are referred only to so much of it as declares (section 28, subd. 7) that every corporation formed under its provisions shall have power "to take and convey persons and property on their railroad by the power or force of steam, or of animals, or by any mechanical power, and to receive compensation therefor." What has that to do with the question I am discussing, viz., the right of the relator to first excavate and then build in the streets of the city the structure already described, without the consent of the city, and without compensation to it? I am quite unable to gather any intimation of a permission to the relator to go under or beneath, or to break into the streets even, except for the necessary purpose of laying its tracks. The act (1850, *supra*), whatever else may be said of it, relates entirely to a surface road, and might as well be invoked as authority for tunnelling the streets for the passage of the relator's horses attached by machinery to cars, as for trenches for a cable. The shaft would differ in size only. Nothing of the kind is permitted.

By the act of consolidation relating to the city of New York (Laws 1882, c. 410) it is provided that the common council shall have power, among other things, "to regulate the opening of street surfaces, the laying of gas and water mains, the building and repairing of sewers, and the erecting of gas-lights." Section 86, subd. 5. They may also regulate the use of the streets for telegraph posts and "other purposes" (section 86, subd. 8), among which, when duly authorized, would doubtless come the one proposed by the relator; and by section 322, a removal of a pavement, or of a street surface, for any purpose, is forbidden until a permit is first obtained from the department of public works. The exercise of this care and authority involves judgment and discretion on the part of the city officers. As construed by the relator, its grant

Effect of general railroad act of 1850.

New York City consolidation act of 1882.

requires the abrogation of these powers and duties, and their surrender into the hands of a private corporation. A demand so extraordinary and subversive of necessary municipal control should be yielded to only when required by the explicit direction of the legislature. We are referred to none. On the contrary, the streets in the city of New York are so regulated and controlled by statute that the fee is in the corporation of the city, in trust, indeed, that the same be kept open for the public. But, subject to that obligation and the easements belonging to the abutting owner, it can be deprived of no use of its surface, or the soil beneath, or the air above it, save by its own consent, or the action of the legislature, and may retain the exclusive use of, and have protection against interference with, either to the same extent that a private person might if he owned the fee. But, if the appellant's claim is good, this is all lost. If the relator may occupy so much of the space under the surface of the street as is now intended, why may it not occupy to the same depth under the entire surface of the street from curbstone to curbstone, nay, even to the inner edge of the sidewalk, and, if to the depth now claimed, why not still deeper, to the entire exclusion of its use for the various purposes to which the city authorities now in fact apply the streets, and such other purposes as the necessities of a city demand, and the invention of its people supply, and thus the grant of an easement upon the surface of the street be so expanded as to take in whatever may be below its surface?

That the present claim is for a road, as to one part surface, and as to another part subterranean, will not, even if successful, conclude the relator from going deeper, and putting the whole underground, or even from laying a new track beneath, still retaining the one upon the surface. It is claimed, however, that under the general grant of the act of 1850 (section 28, *supra*) cable power may be used; and it is shown that at about the time of the passage of the resolution of the common council it was publicly known that cars were in some cases moved by cable. The affidavits in this case disclose that fact; but they also state that the cable system then in use was made effective by "cables fastened to the end of the car, and running along the surface of the road between the rails," with power supplied by a stationary engine. Should such a contrivance be resorted to by the relator, its maintenance would be less astonishing and more plausible than is the assertion of the present claim. Yet it would be inadmissible. Such a device, however, does not concern the system which the relator now seeks to apply. The inquiry in such a case would also be pertinent, why, if such was the intent of legislation as early as 1850, it should be thought

Permanent structure not warranted by authority to construct surface road.

necessary, in 1866, for the legislature to pass an act (Laws 1866, c. 697) supplementary to that of 1850, authorizing the formation of companies to construct, maintain, and operate a railway for the conveyance of persons, etc., "by means of a propelling rope or cable attached to stationary power," but giving no authority, expressly or by implication, to do the things now sought for by the relator? My conclusion is that a permanent structure below the surface is not covered by the grant for a track to be placed on the surface, with a temporary opening for its necessary foundation; and hence that the occupation of the street by the proposed structure of the relator is not within any right acquired by the resolution on Van Schaick's contract, as confirmed by the act of 1854, and that, if allowed, it would be subversive of the rights of the city. This view of the relator's case makes it unnecessary to inquire whether the declaration contained in the grant, that "no steam-power be used on any part of the road for propelling cars," operates as a prohibition against the system sought to be introduced by the relator, and for which alone excavations are necessary.

I am not much impressed by the argument of the appellant that the public welfare and comfort require an assent to the relator's demand. That is a question, however, to be addressed to the legislature, or the city authorities, or both. There is no reason to depart from the general doctrine already adverted to, that whenever privileges are granted by the legislature, and the grant comes under review in the courts, such privileges are to be strictly construed against the corporation, and in favor of the public, and that nothing passes but what is granted in clear and explicit terms. *Rice v. Minnesota & N. W. R. Co.*, 1 Black (U. S.), 358. It was applied in this court in the case of *People v. Com. of Public Works*, already referred to, where an application was made for a *mandamus* requiring a permit to be given to enable the trustees of the Brooklyn bridge to enter upon certain streets for the purpose of laying the foundation for columns necessary for the completion of that great public work according to the plans adopted. The writ was granted, but on appeal to this court the order was reversed upon the ground that the commissioners of public works had no authority to grant the required permit, and that the court below erred in allowing the *mandamus*. In replying to the consideration addressed to us as to the many and obvious advantages of the completed work to the two cities and their inhabitants we held that courts were not at liberty to consider the benefits arising from the plan of the relators, or the necessity and importance of carrying it into effect for the benefit of the public, and that such considerations should have no place in determining questions of the character of the one now before us. We also said that the streets of New York

. . . must remain and be used as such, and for no other purpose, until otherwise directed by legislative enactment, and that without this no authority exists for their invasion. It is possible that such a change in the character of the street as the relator proposes to make would be, as it claims, a public benefit; but the privilege to make it will be followed by great private advantage, and it may be that the city will obtain compensation for granting it. The opportunity to do so should not be taken from it, nor the violation of rights which belong to the public justified upon a forced and unnatural construction of words which of themselves have no such consequence.

I cannot close this opinion in more appropriate words than those used in *King v. Ward*, 4 Adol. & E. 384, and applied in *Davis v. Mayor, etc.*, of the City of New York, 14 N. Y. 525, in both of which cases an argument similar to that of the relator was advanced, and in the first case answered by the declaration of Denman, C. J., that "no greater evil can be conceived than the encouragement of capitalists and adventurers to interfere with known public rights from motives of personal interest on the speculation that the changes made may be rendered lawful by ultimately being thought to supply the public with something better than what they actually enjoy. There is no practical inconvenience in abiding by the opposite principle, for daily experience proves that great and acknowledged public improvement soon leads to a corresponding change in the law, accompanied, however, with the first condition of being compelled to compensate any portion of the public which may suffer for their advantage." The order of the court below should be affirmed with costs.

RUGER, C. J., and ANDREWS and FINCH, JJ., concur. EARL, J., reads for reversal. PECKHAM and GRAY, JJ., concur.

EARL, J. (*dissenting*).—The sole question for our determination in this case is whether the Third Avenue R. Co. has the right to substitute for horses the cable system for moving its cars over its road. This right is disputed by the defendant representing the city of New York. On the 1st day of January, 1853, the city granted to Van Schaick and others, whom we will call the "projectors," the right to lay a double track for a railroad in certain described streets in the city of New York; and in the grant it was provided that "no steam-power be used on any part of the road for propelling cars." In the agreement at the time entered into between the projectors and the city it was stipulated that they might incorporate themselves under the general railroad act, and thereafter they were incorporated under the name of the "Third Avenue R. Co." The grant to the projectors, and through them to the

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Third Avenue Railroad Company, was confirmed by chapter 140 of the laws of 1854, and chapter 10 of the laws of 1860. Under its grant and charter the company laid down a double-track railway upon the surface of the streets described, and its cars have hitherto been moved by horses. It is now proposed by the company to move its cars by means of cables passing under the surface of the streets between the rails of each track, which cables are to be operated by a stationary steam-engine located upon the private property of the company outside of the street lines. It is contended on behalf of the defendant that the stipulation in the grant, that "no steam-power be used on any part of the road for propelling cars," forbids the moving of cars by cables thus operated. We are of opinion that that stipulation would not be violated by the substitution of the cable system.

It is clear that the parties had in mind the movement of cars upon the railway tracks by steam-power propelling locomotive engines thereon, and the purpose was to guard against the annoyance and danger which might be produced in the streets by the operation of such engines. There was at that time in this country no railroad operated by

Grant does not
prevent use of
cable power.

what is now known as the "cable system," and it could not have been within the contemplation of the parties to condemn or prohibit the operation of this railroad in that way. It is not the stipulation that no steam-power should be used for "propelling the cars," but it is that no steam-power should be used "on any part of the road," clearly having reference to the movement of cars by locomotive steam-power applied upon the road itself. Steam, as a motive power, was not prohibited; but its use upon the road was prohibited. With that exception the projectors were left with the right to adopt any safe, practical system for moving their cars. There was no apparent reason for forbidding the use of a stationary steam-engine to be operated upon private property by means of which the cars in the streets could be moved without any noise or annoyance of any kind. The immediate power which moves the cars under the cable system is the moving cable attached to the cars. It is true that the steam communicates power to the cable; but it is the cable power that moves the cars. In a remote sense it may be said that it is the power of steam that moves the cars, and in a still remoter sense it is the heat that produces the steam which furnishes the power; and so causes may be traced back in endless succession, constantly approximating the first cause. But in construing this agreement we must hold that the parties had in mind the proximate, immediate cause, and not the remote one; and that what was intended was the prohibition of the operation of locomotive steam-engines upon the streets in the city.

But this company had not only all the powers conferred upon it by its contract with the city, but all the powers conferred upon it by the general railroad act of 1850, except as its powers were limited and restricted by its agreement with the city. By subdivision 7 of section 28 of the general railroad act, every corporation formed thereunder was authorized to take and convey persons and property on its railroad by "the power or force of steam, or of animals, or by mechanical power." That section clearly confers the power to operate this railroad by the cable system. The cable, as applied to the cars, is a mechanical power, and it is moved by the power or force of steam; and hence, if the right of this company depended upon that section alone, there could be no question that it would have the right to move its cars by means of the cable system. Its right under that section is modified only by the stipulation in the agreement that "no steam-power be used on any part of the road." Hence, whether we test the rights of the company by its grant, or by its charter, or by both combined, we find no prohibition against the use of steam-power communicated by a steam-engine located upon private property outside of the limits of the streets.

Effect of general railroad act of 1850.

It is also argued that the railroad company has no right to substitute the cable system, because that would subject the streets to an additional burden, not contemplated by the agreement between it and the city. There is nothing in that agreement or in the general railroad act which forbids it to increase the burden to which any street was at first subjected. It could, from time to time, change the mode of constructing its tracks, the shape of its rails, and the number of cars which it would move through the streets. It was not limited merely to the construction of a "double track for a railroad upon the surface of the streets." It also had authority to operate, and was bound to operate, the railroad when constructed, and that authority implied the right to operate its road by any customary, usual, and proper methods, and to subject the streets to such burdens as are necessary for that purpose. The only limitation upon its right is that no steam-power shall be used on any part of its road; and, subject to that limitation, it has the right to operate its road upon the surface of the streets by any usual, customary, or proper method, and for that purpose to interfere with the soil beneath the surface of the streets so far as may be necessary, provided the streets be left in such a condition as answers the public use to which they are devoted as streets. The language used in the contract and in the general railroad act was framed in an age of great enterprise, and of rapid advance in science and mechanism, and was purposely made broad and

Manner of operating re-lator's cars not restricted except in case of steam.

comprehensive, so that new and improved inventions for moving cars might be brought into use. It is true that in the construction of a cable road in a street there is more disturbance of and interference with the soil of the street than in the construction of a railroad to be operated by horses. But the disturbance and interference are not much greater, and after the cable road has been completed the surface of the street is for every street purpose in as good condition as the surface of a street upon which a horse railroad is operated; and, indeed, the burden upon the street is less, as there are no horses attached to the cars and they therefore occupy less space, produce less annoyance and less incumbrance upon the street, than cars operated by horses. So far as there is interference with the soil below the surface of a street it is not perceived that it can produce any serious mischief or harm to any interests or rights. So far as it may interfere with gas- or water-pipes or other appliances or structures beneath the surface of the streets, they are to be replaced or moved or put in position at the expense of the railroad company; and the papers show clearly that it is a mere matter of expense, and that all these things can be done so that no damage or mischief will come to any private or public right or interest in the streets. Still further, no serious harm can come from the adoption of the cable system, because it is provided by the order of the special term that the work shall be done under and subject to the supervision of the commissioner of public works, who may appoint inspectors of the work, to be paid by the company, and that the work be carried on in conformity with such reasonable rules and regulations as the commissioner may establish in relation to doing the work, and subject to such orders and directions as he may give in relation to the manner of conducting the work, and the interference with and disturbance of sewers and water-pipes, and the repavement and restoration of surface of the avenues and streets in which such work shall be done.

It is also provided in the agreement between the projectors and the city, which is binding upon the company, that the cars should be run under such prudential directions as the "common council and the street commissioners may from time to time prescribe; and provided also that the said parties shall in all respects comply with the directions of the common council in the building of the said railroad, and in any other matter connected with the regulation of said railroad;" and that the railroad tracks should be laid upon a good foundation, with a grooved rail, or such other rail as should be approved by the common council and the street commissioners. Thus a large power of regulation and control of the railroad and its operation is reserved by the common council; and in the order of the special

term and in the contract there is ample power, even without application to the legislature, to guard against injury to any public or private interests by the substitution of the cable system as desired by the company. But if there is a lack of power in the common council of the city to protect the city and the public, and to secure for them such rights and privileges as under the circumstances should properly belong to them, there is ample power in the legislature, by amendment or alteration of the company charter, to accomplish such ends. Streets are primarily for public use, and are devoted to travel and the transportation of persons and property; and it has frequently been held that a street railway is not inconsistent with such public use, but in aid thereof. By the substitution of the cable system the streets would not be devoted to another or different public use, but to the same public use, to wit, the operation of a street railway. *Newell v. Minneapolis, L. & M. R. Co.*, 35 Minn. 112, 24 Am. & Eng. R. Cas. 298. The fact that the company has hitherto used the power of horses for moving its cars does not forbid the substitution of some other power. A railroad company has at all times the option to change the motive power used for moving its cars, and that option is not lost by its exercise once or oftener. *McCartney v. Chicago & E. R. Co.*, 112 Ill. 611, 29 Am. & Eng. R. Cas. 326.

It is immaterial for the present purpose that the right to substitute the cable system is a very valuable one to the company, for which it could afford to pay if it did not already possess it. If it has the right it may exercise it, subject to such restrictions, regulations, limitations, and burdens as the common council and the legislature may legally and constitutionally impose. It is certainly a consideration entitled to some weight that a majority of the owners of property along the line of this railroad, who are most interested in its operation, and would be most annoyed and injured by the substitution of the cable system if there should be any increased annoyance or injury therefrom, favor the substitution.

We are therefore of opinion that the relator has the right to substitute the cable system, as proposed by it, for the movement of its cars, in the place of horses, and that the order of the general term should be reversed, and that of the special term affirmed, with costs.

PECKHAM and GRAY, JJ., concur.

Power of Street Railway Company to Use Steam Instead of Horse-power.

—See *North Chicago City R. Co. v. Town of Lake View (Ill.)*, 11 Am. & Eng. R. Cas. 42; *Henderson v. Central Pass. R. Co. (U. S. C. C.)*, 20 Ib. 542.

In re PEOPLE'S R. CO.*(New York Court of Appeals, March 5, 1889.)*

Street Railways—New York Act of 1884—Appointment of Commissioners—Successive Applications.—Under the provision of section 4, N. Y. Laws 1884, that in case the consent of abutting property-owners to the construction of a surface road cannot be obtained, the company may obtain the appointment of commissioners to determine whether the road ought to be constructed, the company has the right to make successive applications for the appointment of commissioners to determine as to the construction of different parts of the road, and is not confined to one application embracing the whole route.

Same—Refusal of Property-owners to Consent—Sufficiency of Affidavits.—An affidavit filed by a street railroad company contained a list of the abutting property-owners who had refused their consent to the construction of the road. It also gave a list of the streets in which the persons so applied to resided, and the valuation in each street of the property owned by the person so refusing. The petition showed the total valuation of the property on the streets along which the company proposed to construct its road, and it appeared therefrom that the refusals to consent represented more than one half of the total valuation. *Held*, that the refusal of more than one half of the property-owners to consent to the construction sufficiently appeared.

Same—Consent of Local Authorities—Filing—Condition Precedent.—The New York Act of 1884 (Laws, 1884, c. 252, § 4) relative to the construction of street surface railways in cities, towns, and villages, which declares that the consent of the local authorities shall in all cases be filed in the office of the county clerk of the county in which said railroad is located," does not make it necessary to allege that such consent has been filed as a condition precedent to an application for the appointment of commissioners.

APPEAL from General Term of the Supreme Court, Fourth Department.

The supreme court having, on the application of the People's Railroad Co. of Syracuse, appointed commissioners to determine whether the railroad projected by the company ought to be constructed, the report of the commissioners in favor of construction was confirmed, and the objecting property-owners appealed.

Louis Marshall for appellants.

Martin A. Knapp for respondent.

PER CURIAM.—The People's Railroad Co. of Syracuse is a corporation organized under "An act to provide for the construction, extension, maintenance, and operation of street surface railroads, and branches thereof, in cities, towns, and villages," passed May 6, 1884, and the laws supplementary thereto. The

company was organized and incorporated to construct, maintain, and operate a street surface railway in the city of Syracuse, along and upon various streets designated in their articles of incorporation. Not having obtained the requisite consent of the property-owners for the construction of their road through certain streets of the city, the company applied by petition to the supreme court for the appointment of three commissioners, pursuant to the provisions of the act above mentioned, to determine whether the railroad ought to be constructed and operated along certain streets mentioned in the petition, which petition did not include all the streets through which the company was formed to construct, maintain, and operate its road. Due notice of its intention to apply for such appointment of commissioners was given to the owners of property along certain streets through which it was alleged the company had failed to obtain the requisite amount in value of consents. But no notice of such application for the appointment of commissioners was given to any of the owners of property along the other streets mentioned in its articles of incorporation, and which were not included in the petition above mentioned. Application was made, pursuant to the petition and notice of its presentation, to the general term of the supreme court, and upon such application various property-owners along the streets named in the petition appeared through counsel and opposed the granting of such application. The grounds upon which such opposition was founded were several, the chief of which were that the general term acquired no jurisdiction to appoint the commissioners, because it did not appear from the petition whether or not the necessary consent of the property-owners had been obtained upon the various streets through which it was proposed to construct the railroad, other than those mentioned in the petition; and also that the petition did not allege facts showing that the petitioner had failed to obtain the consent of the owners of more than one half in value of the property upon the streets which were named in the petition.

It is now claimed that the act contemplates but one application by any company organized under it to the court for the appointment of commissioners, and that in such application it must appear that the failure of the company to obtain the necessary amount in value of consents of property-owners in the streets mentioned in the petition includes all the streets wherein the company by its charter will claim the right to go in which such failure exists, and that as to all the other streets consents to the necessary amount have been obtained, and that all those interested as property-owners in the question must be made parties. So that the determination of the commissioners, when

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Company is not confined to one application for appointment of commissioners.

confirmed by the court, is to be a final one in regard to all the streets through which the company intend, or by its charter may have power, to run its tracks. Both of these grounds of objection were overruled at the general term. The commissioners were appointed, and reported in favor of the construction of a railroad through those streets which were named in the petition, and the report was confirmed by the general term, and from such order of confirmation the property owners along such streets have appealed to this court.

They have here argued through counsel questions of law only, claiming that the orders of the general term appointing the commissioners, and subsequently confirming their report, were made without jurisdiction, and are consequently void. The first ground taken by the learned counsel for the property-owners, that the act contemplates but one application, and that everybody interested in all the streets, who have not consented, must be made parties, we do not think is tenable. A careful perusal of the act convinces us that there is nothing to prevent several applications in regard to particular streets named in the petition, provided such streets are also named in the articles of association as being streets through which it is proposed to construct, maintain, and operate the railroad. If the proceeding be taken in regard to but one street, or any number of streets less than the total contained in the articles of association, those only who are interested in property along the streets in regard to which the petition is presented, are proper parties. And no determination made by such commissioners can bind or in any manner affect other property-owners along other streets not mentioned in the petition, and who, if subsequent proceedings should be taken for the appointment of commissioners to determine as to the construction of the road through their streets, would have the right to oppose the granting of the petition, or the making of the determination by the commissioners, wholly irrespective of any previous determination made by other commissioners in other proceedings in relation to other streets. We are unable to see that any evil results would flow from such a position.

The other ground taken by counsel for the property owners, that the petition is defective, and confers no jurisdiction, because it does not allege facts showing that the company failed to obtain the consent of the owners of more than one half in value of the property on the streets named in the petition, we think is equally untenable. Counsel cites, as sustaining his views, *In re* Broadway U. R. Co., 23 Hun (N. Y.), 693; *In re* Broadway, etc., R. Co., 36 Hun (N. Y.), 644; *In re* New York Cable R. Co., *Ib.* 355. We have examined each of the above-cited cases, and are of the opinion that they are not, in principle,

Sufficiency of
allegation of
refusal of con-
sent of prop-
erty-owners.

opposed to the validity or sufficiency of the petition in this case. In those cases the affidavits contained no statement that any effort had been made at any time to obtain the consent of the persons owning property, but a general statement was inserted that some of the owners declined to consent, and that consents of others could not be obtained by reason of their absence, and that application had been made therefor diligently and in good faith. There was nothing to show what had been done, or the names of the persons to whom application had been made, or the amount of the holding of each person, or the total amount of the property owned on the street.

One of the many affidavits in this case, which are substantially alike, shows a list of the property-owners who had been applied to and had refused to consent to the construction of the road in front of and along their respective premises. It also gives a list of the streets in which the persons so applied to live, and the valuation in each street of the property owned by the person so refusing; and the petition shows the total valuation of the property on that portion of each of the streets mentioned along which the company proposed to construct its road; and it appeared therefrom that the refusals to consent represented more than one half on the total valuation. We think that was enough. It would be difficult to say more unless the affidavits should give the conversations had with the various property-owners to whom application was made in which they refused to give such consent.

One other ground was taken: that the petition was defective because it failed to show that the consent of the local authorities was filed in the office of the clerk of the county of Onondaga. This we also think is of no weight. The petition alleges that the consent of the common council of the city of Syracuse was duly given on or about the 27th day of July, 1887, for the construction and operation of the railroad. The petition was dated December 24, 1887, and notice of its presentation was given for the 10th of January, 1888. There is nothing in the act, that we see, making it necessary to state that such consent had been filed in the clerk's office as a condition precedent to the application for the appointment of commissioners. Indeed, it would seem from the provisions of the fourth section of the act that application for the appointment of commissioners might precede the giving of any consent by the local authorities; as it is provided in such section that any consent given by such local authorities shall cease and determine at the expiration of one year thereafter, unless prior to the expiration of such period the company obtaining such consent shall have filed the consent of the requisite amount in value of the property-owners, or the

Consent of local authorities need not be filed before presenting petition.

determination of the commissioners confirmed by the court as therein provided.

The order of the general term should therefore be affirmed, with costs.

All concur.

Street Railway—Location of Main Line—Route Specified in Charter.—Chapter 833, N. Y. Laws of 1872, which created the Metropolitan Transit Co., authorized it to construct a main line along certain designated streets, and three branches, which should be located by a board, and declared that the company should have no right to occupy any streets other than that thereby conferred, only authorized the company to follow the main route prescribed, and did not empower the board to authorize a deviation therefrom. The board having located a main route other than that authorized by the statute, the location of branch lines in connection therewith is also invalid. *In re* Metropolitan Transit Co., N. Y. Ct. App., Jan. 15, 1889.

Elevated Railroads—New York Rapid Transit Act—Validity of Incorporation.—If property-owners in proceedings before the commissioners appointed under the New York Rapid Transit Act to determine whether railroad ought to be constructed, fail to object to the validity of the incorporation of the railroad company, they cannot at a subsequent stage of the proceedings take any objection. *In re* Union El. R. Co. of Brooklyn, N. Y. Ct. App., Jan. 15, 1889.

Same—Notice of Application for Appointment of Commissioners—Due Process of Law.—To constitute due process of law, it is not necessary that personal notice should be given to each party interested; and constructive notice by publication in a newspaper, or by posted notices along the proposed route, of an application for the appointment of commissioners to determine whether a railroad ought to be constructed, is sufficient. *In re* Union El. R. Co. of Brooklyn, N. Y. Ct. App., Jan. 15, 1889.

RUTTLES *et al.*

v.

CITY OF COVINGTON *et al.*

(*Kentucky Court of Appeals, January 31, 1889.*)

Municipal Control of Streets—Power to Grant Right of Way for Railway.—The use of streets for a railroad track is not within the use to which they were originally dedicated; and a city cannot by virtue of a provision in its charter that the council shall have "exclusive control of the streets, sidewalks, lanes, alleys, market-places, and other public grounds within the corporate limits," authorize a railway company to construct its track along one of the city streets.

Street—Power of Company to appropriate—Construction of Charter.—A provision in the charter of a railroad company that it "may construct, operate, and maintain a railway from any point over the line of its railway to the cities of Newport, Covington, or either of them," does not confer upon the company power to operate and maintain its railway upon any

street of the city of Covington with or without the sanction of the city council, the power to use a street for such purpose being only capable of being conferred by express enactment, or by the use of language which necessarily implies the power.

APPEAL from Chancery Court, Kenton County.

O'Hara & Bryan for appellants.

Hallam & Myers for appellees.

LEWIS, C.J. — This action was instituted by Ruttlles and others, residents and owners of real estate in the city of Covington, to enjoin the city council thereof from passing an ordinance, or in any manner granting the right of way over, along, or across any of the streets, alleys, or public places of said city to the Elizabethtown, Lexington & Big Sandy R. Co. for the construction of a railroad; and, the court having dissolved the injunction granted, and dismissed the action, the plaintiffs prosecute this appeal. Case stated.

If the council possesses the power under the charter of the city of Covington it is conferred by section 19, which is as follows: "They [the council] shall have also exclusive control of the streets, sidewalks, lanes, alleys, market-places, and other public grounds within the corporate limits, and shall cause the same to be kept clean and in repair." It is clear that under the general power to control streets, sidewalks, etc., a municipal legislature cannot grant the right to a corporation or individual to appropriate and use the streets of a town or city for any purpose not contemplated by the legislature when the charter was granted, and which would tend to obstruct and hinder the free use of the streets for the purposes and in the modes they are commonly understood to be dedicated for public and private use. And as laying down railway tracks is not such an appropriation or use of streets of a town or city as they are ordinarily intended for, and as was manifestly intended by the section of the charter quoted, it seems to us no power, either express or implied, has been conferred by the city charter of Covington upon the board of councilmen to grant the right of way to the company. City council possesses no power to authorize construction of railway.

If, then, the authority exists at all, it is in virtue of the act of the legislature incorporating the Elizabethtown, Lexington & Big Sandy R. Co. And the section of the charter of the company under which the power is said to exist is as follows: "That the Elizabethtown, Lexington & Big Sandy R. Co. may construct, operate, and maintain a railway or railways from any point or points over the line of its railway to the cities of Newport, Covington, or either of them, and from any point or points on its Charter of company does not authorize it to occupy streets.

said line to any point or points on the line of the Kentucky Central R.," etc. Building and operating a railroad upon the streets of a town or city necessarily results in inconvenience and injury to those residing on and having real estate adjacent to such streets, and the right of a company to thus appropriate to its use what was intended to be used by the public for different purposes, and upon the faith of which private rights and interests have been invested, should never be implied, but permitted to be exercised only when there is a clearly expressed grant by the legislature. The section quoted does not in express terms or necessarily authorize the railroad company to operate and maintain its railway upon any street of Covington with or without the sanction of the city council; for if the power to lay its tracks upon one street may be implied, the right to thus appropriate and use any or all others follows. The legislature has the undoubted power to authorize the construction and operation of a railroad through a city or town, and upon its streets, when they are not wholly obstructed, even without the consent of the municipal legislature. But the authority must be conferred by express enactment, or in such language that it can be necessarily implied. The power, in general terms, given to construct and operate a railroad to a town or city, does not necessarily or even fairly mean the authority or right to appropriate and use any street or alley the railway company may see proper to occupy, without regard to the inconvenience or injury that may result to the public or to individuals thereby. In this case the right given by statute to the company may be fully preserved and exercised by going to the city of Covington, or intersecting its road with the Kentucky Central road, without occupying any and all streets or public places in the city of Covington the company may for its interest or arbitrarily choose to appropriate.

The language of the statutes in the case of *Railroad Co. v. Applegate*, 8 Dana (Ky.), 294, and *Elizabethtown, etc. v. Combs*, 10 Bush (Ky.), 384, was radically different from that used in the section quoted. In each of those cases authority was expressly given to the respective companies to construct their roads through the cities mentioned in the charters. As the legislature has not seen proper to give to the company in this case, in express terms, the right claimed, we are not authorized to strain the language of the statute for that purpose when the effect would be to seriously impair the usefulness of the public streets of Covington, and do injury to the rights of individuals. Therefore the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

Power of Railroad Companies to Construct Track in Street.—The power to build on a street or public highway can only be conferred by the legislature. *Com. v. Erie & N. E. R. Co.*, 27 Pa. St. 339.

A charter containing power to run a railroad through a town will not be construed as a grant of the right to use the streets for the track. *St. Louis, V. & T. H. R. Co. v. Haller*, 82 Ill. 208.

The grant in a charter of the right to construct a railroad on a specified route does not confer any power to construct a railroad upon or along a public highway, unless it is necessary to do so to carry the grant into effect. *Attorney General v. Morris & E. R. Co.*, 19 N. J. Eq. 386. *Inhabitants of Springfield v. Connecticut Riv. R. Co.*, 4 Cush. (Mass.) 63. But such a grant gives the right, as against the public, to cross all public highways which said route may intersect. *Attorney General v. Morris & E. R. Co.*, 19 N. J. Eq. 386.

A statute which authorizes railroad companies to pass "over or under" the streets, authorizes the construction of the track *upon* the street. *State v. Davenport & St. P. R. Co.*, 47 Iowa, 507; *Hine v. Keokuk & D. M. R. Co.*, 42 Iowa, 636; *Chicago, N. & S. W. R. Co. v. Mayor of Newton*, 36 Iowa, 299; *City of Clinton v. Cedar Rapids & M. R. R. Co.*, 24 Iowa, 455; *Milburn v. Cedar Rapids*, 12 Iowa, 246.

Under a clause contained in its charter, that if a railroad company shall find it necessary to change the location of any portion of a public road it is empowered to do so, and to occupy such portions of the road as it may deem necessary or expedient, the company can only change the location of the road when the necessity in point of fact exists, and it is not the sole and exclusive judge of the necessity. *Easton & A. R. Co. v. Inhabitants of Greenwich*, 25 N. J. Eq. 565.

Where the charter of a railroad company authorizes it to establish a railway along a public street to a particular point, the company will be entitled to make a turnout from the main-track to communicate with a depot erected by it near the *terminus* of the road. *New Orleans & C. R. Co. v. Second Municipality of New Orleans*, 1 La. An. 128.

The grant of a right of way over a street will not authorize the company to construct depots, etc., which render the street useless for the purpose to which it was originally devoted. *Lackland v. North Missouri R. Co.*, 31 Mo. 180; s. c., 34 Mo. 259. See also *Farrand v. Chicago & N. W. R. Co.*, 21 Wis. 435.

By statute the Pennsylvania R. Co. was authorized to lay a track on Delaware avenue, Philadelphia, as far north as Dock street, and to acquire such "ground and property near or convenient to said avenue or street as said company may deem necessary for depot and other railroad purposes." The company constructed a depot a short distance above the northwest corner of Dock street and Delaware avenue. To connect their line on Delaware avenue with this depot, they tore up the tracks of a street passenger railway on Dock street. It was shown that if the company had bought the property at the corner there would have been no necessity to cross Dock street to reach the depot. *Held*, that the statute gave the Pennsylvania R. Co. no authority to interfere with the street railway. *Pennsylvania R. Co.'s Appeal (Pa.)*, 3 Am. & Eng. R. Cas. 506.

QUEBEC STREET R. CO.

v.

CORPORATION OF THE CITY OF QUEBEC.

(15 *Can. Sup. Ct.* 164.)**Street Railway—Option to Purchase—Notice—Construction of By-law.—**

The Quebec Street R. Co. were authorized, under a by-law passed by the corporation of the city of Quebec and an agreement executed in pursuance thereof, to construct and operate in certain streets of the city a street railway for a period of forty years, but it was also provided that at the expiration of twenty years (from the 9th February, 1865) the corporation might, after a notice of six months to the said company, to be given within the twelve months immediately preceding the expiration of the said twenty years, assume the ownership of said railway upon payment, etc., of its value, to be determined by arbitration, together with ten per cent additional. *Held* (FOURNIER, J., dissenting), that the company were entitled to a full six months' notice prior to the 9th February, 1885, to be given within the twelve months preceding the 9th February, 1885, and therefore a notice given in November, 1884, to the company that the corporation would take possession of the railway in six months thereafter was bad.

Same—Appointment of Arbitrator—Power of Court.—The court had no power to appoint an arbitrator or valuator to make the valuation provided for by the agreement after the refusal by the company to appoint their arbitrator. FOURNIER, J., dissenting.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming the judgment of the Superior Court.

On the 18th November, 1864, the corporation of the city of Quebec passed a by-law, under the authority of 27 Vic. c. 61, intituled "A by-law allowing the Quebec Street R. Co. to construct a railway in certain streets in the city of Quebec," by

Facts. which powers were, subject to certain restrictions and

conditions, conferred upon the company appellant, to build and operate a railway in the streets mentioned therein; and by the 25th section of the by-law, it was enacted: "The privilege hereby granted to the said company shall extend over a period of forty years, from the date hereof, but at the expiration of twenty years, the said corporation may, after a notice of six months to the said company, to be given within the twelve month immediately preceding the expiration of the said twenty years, assume the ownership of the said railway, and of all real and personal property in connection with the working thereof, and on the payment of their value, to be determined by arbitra-

tion, together with ten per cent over and above the value thereof." And the 30th section provided: "This present by-law shall not come into force and effect until an agreement based upon the conditions and provisions herein mentioned shall have been executed by a notarial deed entered into by and on the part of the said company and the said corporation, on whose behalf the mayor is hereby authorized to sign the said agreement."

On the 9th February, 1865, the corporation of Quebec and the Quebec Street R. Co. executed a notarial agreement in accordance with the 30th section of the by-law, embodying such by-law and containing the above cited 25th section in these words: "That the privilege granted to the said company by the said by-law and by the present deed, shall extend over a period of forty years from the date hereof, but at the expiration of twenty years, the said corporation may, after a notice of six months to the said company, to be given within the twelve months immediately preceding the expiration of the said twenty years, assume the ownership of the said railway, and of all real and personal property in connection with the working thereof, and on payment of their value to be determined by arbitration together with ten per cent over and above the value thereof."

The rights and privileges of the company thus extended for forty years, from the 9th February, 1865, unless terminated in the manner provided by the by-law and agreement.

On the 9th January, 1884, the corporation of the city of Quebec gave notice to the company that it intended to avail itself of the right stipulated in its favor by the by-law, to assume possession of the railway; but subsequently they gave a second notice on the 21st November, 1884, whereby it informed the company that the previous resolution and notice was annulled, and that after the 9th February, 1885, at the time and in the manner provided by the by-law, it would assume the possession and ownership of that part of the railway in question situate within the city limits, and of the real and personal property in connection with the working thereof, and would be prepared to pay the value thereof, together with ten per cent over and above, as established by arbitrators; and by the same notice the corporation notified the company of its nomination of F. X. Berlinguet as its arbitrator, and called upon it to name an arbitrator to value the property conjointly with Berlinguet. To this notification no attention was paid by the company, and on the 9th May, following, Berlinguet proceeded alone to value that part of the company's property situated within the limits of the city of Quebec, which he estimated at a sum of \$23,806.30, and his award was deposited with a notary and signified to the ap-

pellants on the 18th May, 1885. Three days afterwards legal tender of this sum, with ten per cent added, was made to the appellants, and on its being refused an action was instituted by which, after reciting the several statutes, by-laws, contracts, tenders, etc., the corporation concluded that the tenders be declared good and valid; that it be adjudged that it had a right to take possession of the road, horses, harnesses, cars, etc., and that such judgment serve as a title hereto, in favor of the corporation.

This action was dismissed by the superior court on the ground of insufficient notice.

The court of queen's bench for Lower Canada (appeal side) confirmed this judgment on other grounds, but the majority of the court expressed the opinion that the notice was sufficient, the same having been given within the year but not within the first six months of the year in which the term of twenty years had expired; and the recourse of the city corporation was by the last mentioned judgment reserved.

The respondents then brought a second action, claiming that the appellant should be held bound to proceed with the arbitration; that in default of their naming an arbitrator, one should be named by the court on their behalf; and on an award being rendered, upon payment of the amount of the award and ten per cent in addition, the respondents should be authorized to take possession of said railway and property of the appellant company situate within the limits of the city of Quebec, and that such judgment should operate a title in favor of said respondents.

To this second action, the appellants pleaded substantially as in the former action:

1. Want of sufficient notice.
2. That in connection with the railway they, the said company, owned a large amount of real and personal property, and that a large amount of their said property was without the city limits.

That if the city corporation had a right to take the railway which was desired, they must take the whole railway and all the property in connection therewith.

3. That there was no power to force the Street R. Co. to name an arbitrator or to proceed with the arbitration.

Upon these issues, Casault, J., presiding in the superior court, whilst stating that his opinion as to the insufficiency of the notice remained the same as when he delivered the judgment in the first action, considered himself bound by the opinion of the court of queen's bench and gave judgment in favor of the respondents. This judgment being confirmed by the court of

queen's bench for Lower Canada (appeal side) the Quebec Street R. Co. appealed to the supreme court.

Irvine, Q.C., and Stuart for appellants.

P. Pelletier, Q.C., for respondents.

Sir W. J. RITCHIE, C.J.—To my mind it is clear that “after a notice of six months to the said company, to be given within the twelve months immediately preceding the expiration of the said twenty years,” means that the company are entitled to a full six months’ notice before the expiration of the twenty years, and that such six months must be within the twelve months immediately preceding the expiration of the twenty years. In this case no such notice of six months was given within the twelve months, the notice given having been on the 21st November, 1884, which clearly was not a six months’ notice within the twelve months, the expiration of the twelve months being on the 9th February, 1885.

Company entitled to full six months’ notice before expiration of last year.

I think the judgment of the superior court in the first action, which held the notice insufficient, was clearly right and should be restored.

I think it very clear that the right to assume the road was to be at the expiration of twenty years and at no other time. It is a mistake to say the corporation have the whole year to give the notice: they are bound to give such a notice as will entitle them to assume the road at the expiration of twenty years; the express provision and privilege is, that at the expiration of twenty years the corporation may assume the ownership, but they cannot do this unless a notice of six months has been given within the twelve months immediately preceding the expiration of the said twenty years; if they fail to give such a notice, the right to assume the ownership of the road at the expiration of twenty years ceases; so long as they give the six months’ notice within the twelve months they are all right, the six months having reference to the expiration of the twenty years; there was no other time contemplated or fixed for the termination of defendants’, or the assumption of plaintiffs’, rights in the road but the expiration of the twenty years.

The notice given was on the 21st November, 1884, that they would on the 9th February, 1885, assume the possession and ownership, etc. How can this be a good notice in any view of the by-law? It is no notice of six months within the twelve months, nor any notice of six months at all. The notice of the 21st of November, 1884, that on the 9th of February, 1885, they would assume, etc., is only a notice of two months and nineteen days.

The only right the plaintiffs had was to put an end to the

defendants' rights on the expiration of twenty years, and from that date to assume the ownership; and if they failed to give the notice necessary to accomplish this, they failed to avail themselves of the privilege accorded them by the agreement and by-law.

STRONG, J.—Under the authority of an act of the legislature of the late Province of Canada (27 Vic. ch. 61), by which the present appellants (defendants in first instance) were incorporated, the city of Quebec passed a by-law, authorizing the company to lay down rails in the streets of Quebec, and amongst other things providing as follows:

“The privilege hereby granted to the said company shall extend over a period of 40 years from the date hereof, but at the expiration of 20 years the said corporation may, after a notice of six months to the said company to be given within the 12 months immediately preceding the expiration of the said 20 years, assume the ownership of the said railway and of all real and personal property in connection with the working thereof, and on the payment of their value, to be determined by arbitration, together with ten per cent over and above the value thereof.”

This by-law further provided that the railway was not to go into operation until “An agreement based upon the conditions and provisions therein mentioned should have been executed by a notarial deed entered into by an on the part of the company and the said corporation, on whose behalf the mayor was thereby authorized to sign the said agreement.”

A notarial deed embodying an agreement of the same tenor and effect was accordingly duly passed on the 9th February, 1865. The 20 years therefore expired on the 9th February, 1885. On the 21st November, 1884, the respondents gave notice that they would take possession of the railway and its property under the expropriation clause mentioned on the 9th February, 1885, that is, within three months from the date of the notice, and by the same notice the corporation appointed Mr. F. X. Berlinguet as its arbitrator to value the property according to the provision of the by-law, and called upon the company to name an arbitrator to make the valuation conjointly with Mr. Berlinguet. The company did not appoint any arbitrator, and on the 9th May, 1885, Berlinguet proceeded alone to value that part of the company's property situated within the limits of the city of Quebec, which he estimated at a sum of \$23,806.30, and his valuation or award to that effect was deposited with a notary and signified to the appellants on the 18th May, 1885. Three days afterwards the respondents caused this amount of the valuation with 10 per cent additional to be tendered to the

appellants through the ministry of a notary. They then instituted an action offering to consign the amount of Berlinguet's valuation and the 10 per cent additional, and concluding for a declaration of their title, and of the right to the possession of the property. To this action the appellants pleaded a defence in law (demurrer) and a perpetual, exception and on the 8th February, 1886, the superior court, presided over by Mr. Justice Casault, rendered a judgment, dismissing the action on the ground that no notice of six months within the twelve months immediately preceding the expiration of 20 years from the date at which the by-law came in force had been given according to the requirements of the by-law and the notarial deed executed pursuant to its terms.

The corporation appealed to the court of queen's bench, which latter court affirmed the judgment of the superior court, but upon other grounds from those which had formed the "considérants" of the judgment pronounced by Mr. Justice Casault.

The respondents then instituted the present action, in which they repeated the allegations of their former action, and in addition, the facts that the first action had been instituted and that the judgment already mentioned had been rendered therein; and they concluded that the company be ordered to name an arbitrator to value jointly with the one named by the corporation the property of the company situated within the city limits, and in default of its so doing, that the court should itself name an arbitrator to act for the company, and that upon the payment of the amount to be awarded and 10 per cent in addition, the corporation should be authorized to take possession of such property situate within the limits of the city of Quebec, and that such judgment should be declared to operate as a title in favor of the corporation. To this action the appellants pleaded, (1) That the company had failed to give the six months' notice required by the by-law and agreement; (2) that by the notice stated in the action the company only proposed to assume and pay for so much of the company's property as was comprised within the limits of the city of Quebec, whilst the company had, in accordance with its powers in that behalf, extended its line beyond the city limits and had other property beyond the limits which the city, if entitled at all, were bound to include in any expropriation under the by-law and agreement. (3) The appellants pleaded a defence *en droit*, or demurrer, by which they denied the legal sufficiency of the notice set forth in the action, excepted to the power and jurisdiction of the court to appoint an arbitrator for them, and insisted that the acquisition of the railway and its works and property would be *ultra vires* of the corporation. Upon issues taken on these pleas and defences the parties went to trial before Mr. Justice Casault,

who, whilst stating that his opinion as to the insufficiency of the notice remained the same as when he rendered judgment in the first action, considered himself bound by the opinion of the court of queen's bench, and therefore rendered a judgment by which the company were ordered to appoint an arbitrator within 15 days. This judgment having been affirmed by the court of appeal, two judges (Mr. Justice Baby and Mr. Justice Church) dissenting, has now been appealed from to this court.

I am of opinion that the notice of the 21st November, 1885, was too late. The clause of the by-law and of the agreement executed in pursuance of it, already set forth, clearly contem-

Notice given
by city was
too late.

plate that the assumption of ownership by the corporation shall be at the expiration of 20 years from the date at which the by-law took effect and not later. It is not disputed that the by-law came into force on 9th February, 1865, and that the 20 years consequently expired on the 9th February, 1885. The corporation being in law bound to the utmost exactitude as to time in executing this unilateral clause, were therefore bound to show that they were in a position by a strict and literal observance of all prerequisite conditions to claim the right to assume the ownership on this 9th February, 1885. Then what were the prerequisites? 1st. They were bound to show that they had given a notice within twelve months immediately preceding the expiration of the 20 years. The only notice given within that period was the notice of the 21st November, 1884. 2dly, they had to prove that at the time they claimed the right to assume the ownership of the railway, at the end of the 20 years, they did so after having given to the company a notice of six months. Then, do they show that on the 9th February, 1885, they had given a six months' notice? The only available notice they show, that is, the only notice given within the immediately preceding twelve months, is that of the 21st November, 1884. But this notice had not been given six months before the 9th February, 1885, and as no other notice is suggested to have been given within the twelve months, the corporation wholly fail to establish that they have complied with these preliminary requirements and conditions, upon which alone they could claim to exercise the unilateral right of preemption or expropriation conferred by the by-law and agreement.

That an option of purchase of the kind given to the corporation in the present case, being a condition potestative, must be executed literally and strictly as to all its terms and conditions, including time, appears well established both by French and English authorities; Pothier on Obligations, Ed. Bugnet, No. 206; Demolombe on Contracts, Tome 2, Nos. 330, *et seq.*; Larombière, 2 vol. p. 91; Fry on Specific Performance, 2d ed. p.

471 in note; *Austin v. Tawney*, 2 Ch. App. 143; *Brooks v. Garrod*, 2 De G. & J. 62. Upon this ground alone the appellants are therefore entitled to succeed.

Further, it appears very clear that the great weight of French as well as English authority is against the respondents as regards the right of the court to appoint an arbitrator or valuator to make the valuation provided for by the agreement.

It is universal and elementary law that the price is the very essence of the contract of sale, and that no such contract can be considered as completed unless either directly or indirectly the parties are agreed as to the amount and terms of the price. A valuation by an arbitrator appointed by the corporation and one appointed of office by the court for the company after their refusal to appoint one for themselves would not involve any such agreement as to the price as the law absolutely requires. It is not therefore surprising to find the best commentators almost universally of accord against such a jurisdiction. The jurisprudence of the French courts is also the same way. I refer to the following authorities on this point: *Troplong, Vente*, Nos. 156, 157; *Duranton*, vol. 16, Nos. 108 and 112 to 114; *Delvincourt*, p. 125 in note; *Laurent*, vol. 24, Nos. 74-77; *Zachariae par Massé & Vergé*, Tome 4, p. 277; *Marcadé* on art. 1592, p. 178; *Aubry & Rau*, ed. 4, Tome 4, p. 337, sec. 349; *Taulier*, Tome 6, pp. 27 and 28; *Alauzet*, Code de Commerce, Tome 1, No. 103; and the jurisprudence is to the same effect in *Dalloz Jur. Gen. Vente*, 380—D. P. 62, 1-242 note; *Limoges*, 4 April, 1826, *Jur. Gen. Vo. Vente*, 381-10; *Toulouse*, 7 March, 1827, *Jur. Gen. Vente*, 381-20; *Paris*, 6 July, 1812, *Jur. Gen. vol. Vente*, 382 (motifs); *Montpellier*, 13 February, 1828 *Ib.* 195; *Jur. Gen. Vente*, 380, *Trans-Hy.*, 94, 95, D.P. 62, 1, 242 notes; *Jur. Gen. Vente*, 378; *Pau* 30 November, 1859, D.P. 60, 2, 36. The English authorities are decisively to the same effect: *Milnes v. Gery*, 14 Ves. 400; *Derby v. Whittaker*, 4 Drew. 134; *Tillett v. Charing Cross Bridge Co.*, 26 Beav. 419.

The provisions in the English Common Law Procedure Act as to the appointment of arbitrators by the court in default of an appointment under a contract, do not apply to mere valuers, *Collins v. C.*, 26 Beav. 306; *Fry on Specific Performance*, ed. 2, p. 155. The circumstance that art. 1592 C.N. has not been textually re-reproduced in the C. C. of Quebec can make no difference. There is nothing in the code indicating that there was any intention to alter the law in such an important and radical particular as that which regards the price as an essential of the contract of sale, the rule which is the foundation of this objection. Therefore I think the appellants are entitled to have the judgment appealed against reversed upon this ground also.

Court cannot
appoint arbi-
trator to make
valuation.

The objections that the corporation do not propose to assume all the company's property, and that insisting that the by-law and agreement as regards the clause reserving an option of purchase was *ultra vires* of the corporation, need not be considered, and I express no opinion on these points.

The appeal should be allowed with costs, and the action dismissed with costs to appellants in both the courts below.

FOURNIER, J.*—On November 18, 1864, the corporation of the city of Quebec adopted a by-law on the subject of the construction of a tramway within its limits. This by-law is inserted **Case stated.** at length in the notarial deed made between the city on the one part and the appellant company on the other, by which the latter bound itself to construct the tramway, of which mention was made in the by-law and deed, on the conditions and stipulations set forth in these two instruments. These stipulations have not only the force of a municipal by-law, but they have also the obligatory character of a contract made in authentic form.

The clause which gives rise for a second time to a litigation between the parties on the same questions is identically the same as that contained in the contract, and is expressed in the following terms: "The privilege hereby granted to the said company shall extend over a period of 40 years from the date hereof, but at the expiration of 20 years the said corporation may, after a notice of six months to the said company to be given within the 12 months immediately preceding the expiration of the said 20 years, assume the ownership of the said railway, and of all real and personal property in connection with the working thereof, and on the payment of their value to be determined by arbitration, together with ten per cent over and above the value thereof."

The corporation of the city of Quebec, after the notice of six months required by the contract and by-law, instituted a first action founded on an award rendered by the arbitrator nominated by the said corporation after the refusal of the appellant to name its arbitrator to proceed with the arbitration provided for by the by-law. Mr. Justice Cross has, in his opinion in that cause, given the history of the first action, showing for what reasons it was dismissed by the superior court, the judgment of which was confirmed by the court of queen's bench with the exception of that part of the judgment declaring that the notice given was insufficient, the court of queen's bench declaring on the contrary that this notice was sufficient, and reserving to the corporation its remedy in another action.

* The original opinion of Mr. Justice Fournier was delivered in French. The editor is responsible for the translation.

By the second action the said corporation, desiring to enforce performance of the agreement for arbitration, demands that the appellant be ordained to name an arbitrator, and that, on default, an arbitrator be named by the court, etc.; that on payment of the amount which shall be fixed by the award, with ten per cent in addition, the corporation shall be authorized to take possession of the tramway, and the other properties forming part of it situated within the limits of the city and belonging to the appellant; and that the judgment should confer title upon the corporation.

The appellant company has pleaded anew—First, the insufficiency of the notice given; second, that the corporation of the city of Quebec has no right or power to own or operate a tramway as proprietor; third, that it had, for the operation of the tramway, movable and immovable property, a large part of which was situated beyond the limits of the city; that if the said city wished to take possession of the tramway, it should also take possession of all the other properties which form part of it; and, fourth, that the said company could not legally be compelled to name an arbitrator, or proceed to arbitration.

The principal question is, without doubt, that of the sufficiency of the notice required to put an end to the privilege conferred by the by-law. The language of the by-law in this respect has given rise to a difference of opinion between two appellate courts in deciding this cause.

Sufficiency of notice.

Mr. Justice Casault, of the superior court, has held that the notice, to be legal, ought to be given at least six months before the expiration of the last twelve months of the twentieth year. The majority of the court of queen's bench has declared, on the contrary, that notice such as that given was sufficient. The clause of the by-law says: "But at the expiration of twenty years the said corporation may, after a notice of six months to the said company to be given within the twelve months immediately preceding the expiration of the said twenty years, assume," etc. The first twenty years of the privilege terminated February 9, 1885. The notice was given November 21, 1884, consequently before the expiration of the last twelve months. It is only a condition imposed to the formality of the notice that it should be given within the last twelve months; the party obliged to give it has until the last minute of the twelve months to give notice, and provided that it be given within the twelve months it is legal. The period for giving it is not twelve months less six months, as would be the case if the notice in question ought, as has been urged, to be given six entire months before the expiration of the twelve months. The clause does not contain any expression which can justify an interpretation which reduces to the first six months of the last year the period for

giving notice. It is clearly a period of twelve months. It is true that in the actual case, the notice being given November 21, the six months' delay would necessarily expire after the twentieth year had terminated, but it is the terms of the agreement which make it so. The parties deemed it advisable to so stipulate doubtless because they foresaw that it could not result in any inconvenience. The agreement, as remarked by Mr. Justice Cross, does not require the notice to be given in the first six months. "On the contrary, it in effect says that it may be given at any time within the whole year, and therefore up to the last day of the year."

The reasons urged by Mr. Justice Cross to sustain the opinion of the court of queen's bench on the sufficiency of the notice appear to me so conclusive that I cannot do better than quote the language of the learned judge.

"It is not like the case of a lease, where the law provides for its continuance by regular stated annual terms, and, in the absence of a specific agreement, requires as a condition precedent to the tenant's right to continue, a pure notice of a period whose limit is fixed by law, and in default whereof the law prescribes as a penalty against the lessor, and in favor of the lessee, that the lease shall continue for another year.

"The parties in this instance had in view the termination of their relations at the end of twenty years; that was the main object of the stipulation; but it did not necessarily follow that these relations should absolutely cease on the very day of the termination of the twenty years; on the contrary, much necessarily remained to be done after the expiry of the twenty years, in the valuation of the property, the payment of the price with its augmentation, and other like matters, before the relations established between the parties could effectually cease; and this especially required time on the part of the street railway company. Hence, when the city corporation had expressly the whole year in which to give the notice, the street railway company could always claim the six months delay after the notice, although it may have carried them nearly six months into the following year. So that although the street railway company might have insisted on terminating their relations to the city corporation on the exact expiry of the twenty years, yet they were not obliged to do so, but could insist upon the full expiry of a six months' notice given to them within the year before being obliged to take measures to relinquish their position; that is, the six months' previous notice was stipulated for in their interest, in case they should require the whole of that time." These reasons appear to me sufficient to sustain the decision of the court of queen's bench, in which I am compelled to concur.

As to the power of the corporation to own and operate the

tramway in question, it is altogether useless to trouble one's self on that question, since the Act 27 Vict., c. 61 scarcely leaves any doubt on the subject. Its right to take possession is alone brought question to-day. When the corporation desires to operate the tramway, it will then be time to raise the question of the extent of the powers which the law has conferred upon it in that respect.

As to the extent of the movable and immovable property which ought to be included in the valuation in the arbitration, that is determined by the notarial deed of February 9, 1865. It ought to be limited to that part of the tramway which is situated within the limits of the city. Neither the by-law nor the contract gives any power to the corporation on this subject. As to the movable property which ought to be valued as pertaining to the tramway, that ought to be left to the decision of the arbitrators.

Upon the clause by which the parties have engaged to refer to arbitrators the valuation of the tramway and the movable property of the company, the majority of the court of queen's bench has formally pronounced itself in favor of its validity, admitting, as Mr. Justice Cross has done, ^{Appointment of arbitrators.} that there was a divergence of opinion among the writers. But as this learned judge has observed, the law appears to be altogether on the side of those who maintain that this clause may be put in force. The authorities cited by the appellant in his brief to prove the impossibility of enforcing the agreement, have no application to the actual case. They concern only the case of a sale in which the vendor and purchaser have agreed to leave the price of the article sold to the decision of a third person; the question arises on the subject of the legality of the consent indispensable to the validity of the sale. There is here no sale, for the property (the streets of the city) which form the subject of the clause in question is inalienable. There is not, and there could not have been, any sale by the appellee of the streets of the city which it has permitted the appellant to use for a certain number of years. This property is inalienable in its nature. The transaction in question is only a privilege, of which the consideration received by the city was the facility of communication offered to the citizens. It has provided that at the expiration of the privilege the corporation shall retake possession of the tramway and its appurtenances, compensating the appellant company and paying ten per cent in addition. This is not a sale; the street has not been sold; it is a simple condition of the agreement which permits the appellee to re-enter upon its property upon indemnifying the dispossessed party for the cost of construction. The sum to be paid is not a price, since the appellee retains what the appellant cannot own,

the street in question. It is neither more nor less than an indemnity for the works of the appellant. As the property was to return to the appellee at the end of twenty years, nothing was more reasonable or more conformable to the judicial customs of the country than to agree, as they have done in the present case, that the value which would be estimated by arbitration should be paid, and further, an additional sum of ten per cent of the value so estimated. As will be seen, the question involved has no relation to a sale, and the authorities cited by the appellant are inapplicable. The question raised concerns only the validity of the clause by which the parties have agreed that their differences on the subject of the valuation should be judged by arbitration. Is this clause valid? There is a divergence of opinion on this subject among the authors, as has been observed by Mr. Justice Cross. For myself, I do not wish to enter into a discussion of the reasons given upon the opposite sides—that has already been done; I will content myself with citing an authority that the parties may see, as has so well been said by Mr. Justice Cross, that the law is upon the side of those who sustain the validity of this clause. See *Dalloz, Rep. de Jurisprudence (Arbitrage, No. 454)*.

But, supposing that the transaction may be considered as a sale of which the price ought to be left to the arbitration of experts who will be named afterwards, the clause is valid, as *Dalloz* proves. See *Vente, No. 382*.

I am of the opinion that the judgment ought to be confirmed, but I am alone in this opinion.

HENRY, J.—By agreement and in virtue of a by-law the appellant company obtained the right to exercise the powers and privileges of a street railway company in the city of Quebec for a period of forty years, and upon one condition only could this right be put an end to, viz.: “the privilege hereby granted to the said company shall extend over a period of forty years from the date thereof, but at the expiration of twenty years the said corporation may, after a notice of six months to the said company to be given within the twelve months immediately preceding the expiration of the said twenty years, assume the ownership of the said railway and of all real and personal property in connection with the working thereof and on the payment of their value to be determined by arbitration together with ten per cent over and above the value thereof.”

The notice in this case was given on the 21st Nov. 1884, and the twenty years expired on the 9th Feb. 1885. I entirely concur in the opinion expressed by the majority of my learned colleagues that the notice is too short. The condition is a condi-

Notice given
was insuffi-
cient.

tion precedent to the right of the corporation to assume the ownership of the railway after twenty years.

I also concur with Mr. Justice Strong in holding that the court has no power under the agreement to appoint an arbitrator for the company. If it were the case of expropriation of public land for public use the court, no doubt, would have had power to appoint the arbitrator. But the agreement here distinctly provides that the company's arbitrator should be appointed by themselves and there is no provision that in the case of the refusal of the company to appoint their arbitrator a judge or court can then appoint one.

Court has no power to appoint arbitrator.

I have serious doubts on the other point raised, but it is sufficient for me to say that upon these two grounds I am of opinion that the present appeal should be allowed with costs and the judgment of the superior court in the first action restored.

TASCHEREAU, J.—I am of opinion that the notice is defective and therefore the present appeal should be allowed with costs.

GWYNNE, J.—The notice was quite insufficient; there is therefore no necessity to refer to the other points argued.

Appeal allowed with costs.

CITY OF CONCORD

v.

CONCORD HORSE R. CO.

(*New Hampshire Supreme Court, March 15, 1889.*)

Street Railway—Laying Out—Main Line—Turnouts.—Under the provision of the charter of a street railway company that the railway shall be laid out by the mayor and aldermen of the city in like manner as highways are laid out, the mayor and aldermen are required to lay out not only the main line of the railroad, but also such turnouts as are necessary for its operation.

Same—Sufficiency of Laying Out.—In 1880 the mayor and aldermen of the city laid out a single track railway by bounds, courses, and distances, and provided in the record that "said horse railroad company may construct such suitable turnouts on either side of said centre line as they may find necessary in the prosecution of the business to be done upon said railroad." *Held*, that the act of the mayor and aldermen was not such a

laying out of the turnouts as complied with the provision of the company's charter that the railroad should be laid out by the mayor and aldermen in like manner as highways are laid out.

BILL in equity at the instance of the city of Concord against the Concord Horse R. Co., to enjoin the construction of a side track or turnout on Fiske street in said city. The second section of the charter of the defendant company provides that the railroad to be constructed by it "shall be laid out by the mayor and alderman of said Concord in like manner as highways are laid out." The mayor and aldermen on August 12, 1880, laid out a single track road under the provisions of the charter, and declared that a line described should "be the centre line of said horse railroad track, and said horse railroad company may construct such suitable turnouts on either side of said centre line as they may find necessary in the prosecution of the business to be done upon said railroad." In June, 1888, the company having found it necessary for the operation of the road to construct a turnout or side tracks, began construction without having the turnout laid out by the mayor and aldermen. The city thereupon instituted the present suit.

Case stated.

Albin & Martin and *Jeremiah Smith* for appellant.

H. G. Sargent for appellee.

BINGHAM, J.—If the plaintiff in this action were the owner of the fee in the land a different question would be presented. Then the inquiry would be whether the legislature had the constitutional power to impose on a land-holder the additional burden of the defendant's street railroad without his consent or the exercise of the right of eminent domain. This question has not been decided in this state, and is not free from difficulty. *Williams v. New York Cent. R. Co.*, 16 N. Y. 97; *People v. Kerr*, 27 N. Y. 188. But the parties here are the city of Concord and the Concord Horse R., each having its rights and powers given and its duties and obligations fixed by the legislature, which gave the plaintiff a corporate existence, and imposed upon it the duty of laying out and maintaining streets and highways sufficient for the public accommodation. The plaintiff held these easements as trustee for the public, subject to the control of the legislature; but it had no fee or title in the land in this relation, as a private corporation, aside from its trusteeship for the public. As to the plaintiff, the legislature could create an additional facility to expedite the public travel in the plaintiff's highways to be operated in common or jointly with those then in use, and it could make no legal objection, because it was subject to the action of the legislature in this respect. *Worster v. Plymouth*, 62 N. H. 193, 206.

The inquiries, then, are as to the meaning of the defendant's charter,—how it modified or changed the plaintiff's control of the streets, and whether the defendant was doing what it was not authorized to do when the temporary injunction was issued. The legislature made the defendant a corporation, with power to construct, maintain, and use a railroad with a convenient single or double track, from any point on Main street in the city of Concord, over, along, and upon such of its streets as might be necessary for the public accommodation, to West Concord, with branches and side tracks to other parts of the city. This grant to the defendant carried with it by implication the right to have as a part of its railroad such turnouts as were necessary, though not specially named in the charter. Section 2, however, of the charter provides that the railroad shall be laid out by the mayor and aldermen of the city of Concord in like manner as highways are laid out, and that they shall give notice to all the land-holders abutting on the streets or highways through which the railroad shall pass of the time and place of hearing as to such laying out, by publication in such of the newspapers in Concord as they may direct, 15 days before the hearing, and they shall determine the distance the track shall be laid from the sidewalks. Before the charter, the city controlled its streets and highways, and no party had the right to construct a special track on which to carry passengers for private gain to the exclusion of the remainder of the travelling public. The entire worked part of its streets was open alike to all. Now the defendant is given this privilege. It, however, appears in other provisions of the charter that the use of the land on which the defendant's rails may be laid is not exclusive, but may be used by the travelling public, when not in the actual use of the defendant, and that the mayor and aldermen have the right to direct the motive power that shall operate the railroad, and to make all such regulations as to the rate of speed and the mode of using it as the public safety and convenience may require. Laws 1878, c. 118, §§ 4-6, 10, 11. This proves, not only a special legislative intention to preserve to the city the right to lay out, the right to authorize the operating power, to regulate the rate of speed, the mode of using, the grade at which it is to be constructed, and the right to take up the streets through which the railroad may pass, but a general legislative purpose to constitute the mayor and aldermen, as between the railroad and the general public or abutting owners, the tribunal to decide and direct in these matters, whether they arise from express grant or legal implication. The word "railroad," as used in section 2, means the railroad described and implied in section 1 in all its parts, and no excep-

Power of defendant to construct turnout.

tion is made in section 2 of the manner of laying out any part of the railroad described or implied in section 1, and a fair construction of the charter requires the mayor and aldermen to lay out the necessary turnouts.

The turnout in question, on the facts in the case, may be one that the law would now imply the right to have laid out by the mayor and aldermen, but it has not been done. This is conceded, unless the mayor and aldermen laid it when the main track was laid, in August, 1880.

What they did then was clearly not a laying out according to the charter, nor was it then understood to be a laying out. It was not then known that a turnout would be necessary at this point, and the most that can be claimed was an attempt by the mayor and aldermen to delegate the right to locate and construct turnouts as they might be found necessary, which they could not do. The injunction is made perpetual. Case discharged.

BLODGETT and CARPENTER, JJ., did not sit. The others concurred.

Street Railway—Construction of Charter—Power to Cross Streets.—The charter of a street railroad company authorized it to construct a railway "upon and over such streets" as should from time to time be fixed and determined by the city council, "except in" certain streets. *Held*, that the clause excepting such streets from the franchise of the railroad company did not prohibit the company from laying its tracks across them. *State v. Newport St. R. Co.*, R. I. Sup. Ct., June 29, 1889.

By a resolution of the city council, a street railway company was authorized to lay a track along a certain street, and it was provided that the track "shall be laid in the centre of said street with a street rail in such a manner that wagons, sleighs, and vehicles of every description can conveniently cross and recross said street without hindrance at any time and at any point." A track was laid on the centre of the street up to the point at which the street entered an open space formed by the intersection of several streets. On one side of this space there was a slight deflection from a straight line. *Held*, that such deflection did not, in the absence of evidence tending to show an actual obstruction of the street, amount to a nuisance, for which the company was subject to indictment. *Com. v. Wilkes Barre & K. St. R. Co.*, Pa. Sup. Ct., June 28, 1889.

MEMPHIS, PROSPECT PARK AND BELT R. CO., *et al.*

v.

STATE.

(Tennessee Supreme Court, June 1, 1889.)

Street Railways—Obligation to Repair Streets—Obstruction.—Even in the absence of a charter provision, a street railroad company is bound to keep the part of the highways occupied by its road-bed, and extending at least to the ends of the cross-ties, properly graded and in good repair, so as not to obstruct travel across the road-bed, or longitudinally upon it.

Same—Indictment for Nuisance—Removal of Obstruction.—A street railroad company which fails to keep its road-bed in good repair and thereby obstructs travel, may be indicted for maintaining a nuisance, and the court may direct the obstruction to be removed in the event of a failure of the company to do so.

ERROR to Criminal Court, Shelby County.

Gantt & Patterson for plaintiffs in error.

James M. Greer and *Atty. Gen. Pickle* for defendant in error.

DICKINSON, Special Judge.—The defendant railway company and William Katzenberger were indicted for creating and maintaining a nuisance in McLemore avenue, Shelby county, and it is charged that such nuisance was consequent upon the unlawful location and improper maintenance of a railway on said avenue. William Katzenberger was receiver of the defendant company, and the condition complained of in the indictment existed at the time of his appointment, and continued during his management up to the time of indictment. It appears from the evidence that the part of the avenue occupied by the track of the defendant company was not at all points in such a condition that the same could be crossed by travellers on horseback or in vehicles, or be travelled over longitudinally, with safety. By an agreed state of facts it appeared that the "railroad tracks, the ties, and rails were above the surface of McLemore avenue,—a public road at the time laid in the indictment,—and obstructed public travel on that part of said highway occupied by said railroad, as alleged in the indictment." The decision of the cause was submitted to the judge without a jury, and he found defendants guilty as charged in the indictment, fined them \$1000, and ordered the obstructions to be removed, unless defendants should do so within 30 days. It ap-

Facts.

pearing that the receiver had no means and no authority under his appointment to abate the nuisance or pay the fine, the amount of his fine was reduced by the court to five dollars.

On January 29, 1887, the Memphis, Greenwood & Prospect Park R. Co. was incorporated under the regular form provided for street railroad companies, as set out in sections 1920-1925, Mill & V. Code. Section 1921 provides that such companies are "authorized to consummate any contract with the county court necessary to get the right of way along the public roads of the county." At the April term, 1887, said company applied to the county court of Shelby for permission to lay its tracks upon that portion of McLemore avenue designated in the indictment, and on April 22, 1887, a contract was made between the county and said company, whereby the county consented to the construction of a railroad by said company upon said portion of McLemore avenue. This contract contains provisions as to the manner of grading and constructing the road, and provides that the company "at the crossing of each street and alley on said avenues and roads shall place good and sufficient crossings, so as not to interfere with travel over such roads and streets." There is no stipulation for the keeping in repair by the company of any portion of the avenue occupied by its track, or of the crossings. On October 24, 1887, the defendant, the Memphis, Prospect Park & Belt R. Co., was chartered under the form provided for steam railway companies. Defendant company, so far as the record shows, had no contract with the county, but on November 22, 1887, it purchased the franchises and properties of the Memphis, Greenwood & Prospect Park R. Co., which included the line of railway then being operated upon McLemore avenue by said company under its charter and its contract with the county. On April 10, 1888, a committee to whom had been referred a petition of the Memphis, Greenwood & Prospect Park R. Co., reported that they had gone over the track and road-bed of said company located on said portion of said avenue, and found the grading satisfactory. Nothing is said in this report, nor in any other proceedings of the county court which appear in the record, about the manner of construction of the road, and nothing of the acceptance of the road by the county as having been constructed in accordance with the contract with the county, as counsel for the defendant contend. There was no change in grade, and no repairs from the time of said report up to the time of the indictment. The railroad provided for in the charter and the contract with the county is that known as a street railroad. Such a road contemplates travel upon it longitudinally. This is manifest from the charter, which provides for other vehicles yielding the right of way over track and switches to the passing cars, and for the cars yielding the right

of way of the track to the fire-engines. Mill. & V. Code, § 1924. There is no proof by defendant as to how the road was constructed. It relies upon the alleged acceptance by the county as conclusive evidence that it was, on April 10, 1888, up to the requirements of its charter and of the contract with the county, and the further legal proposition that, having so constructed its road, it was under no obligation to keep the road-bed and crossings in repair. As stated above, the county court did not pass upon and accept the road. The report relied upon as showing this fact related merely to grades, in reference to the grades of surrounding county roads; a uniform system of grading being the particular matter under contemplation. There is nothing in the record to show when the nuisance began, whether the road was a nuisance and obstruction to travel from the start, or whether it became so by use and the action of the elements. The defence is made upon the latter assumption, and it is presumable that the facts are that way, for otherwise there could be no ground for contest. The state and defendants both treat the case as presenting only the question of duty to repair, and it will be considered in that aspect.

The doctrine contended for is that a railroad company, after constructing its road, and having restored those portions of the public highway disturbed to their former state of usefulness, is under no duty to make any repairs. Company must not only restore, but keep street in repair—Authorities. The case of *Chesapeake, O. etc. R. Co. v. State*, 16 Lea (Tenn.), 300, is relied on as a conclusive adjudication of this question in favor of defendants; but that case has been expressly overruled at this term, in an opinion by Judge Caldwell in the case of *Railroad Co. v. Dyer Co.*, 3 Pickle (Tenn.). In *Louisville & N. R. Co. v. State*, 3 Head (Tenn.), 524, the following principles, as applicable to the occupancy of public highways by railroads, are stated: "Railway companies are liable to indictment for obstructing a public highway contrary to the powers granted in their act." "The company must so use their own rights as not to injure or take away the rights of others." Pierce, R. 245, says: "The laying of a railroad across highways often requires excavations and erections, and a greater or less change in the surface. The duty, however, to restore the highway, as far as may be, to its former condition, and to erect and maintain structures necessary for such restoration, is presumed to be incumbent on the company, even without any express requirement imposed by statute. . . . It is a continuing duty, and binds other corporations which succeed to the ownership or possession of the railroad." To the same effect is Mills, Em. Dom. § 198. In a note to *Cooke v. Boston & L. R. Co.*, on page 332, 10 Am. & Eng. R. Cas., giving a summary of the decisions on this subject, the following is stated :

"As to the question whether the company is bound to maintain the crossing permanently or not, the current of authority seems to be that it is so bound. *People v. Chicago & A. R. Co.*, 67 Ill. 118; *Eyler v. Allegany County Com.*, 49 Md. 257." And this, though by a statute the obligation is in express terms only not to obstruct the safe use of the highway. Where a statute provided that "a railroad shall be so constructed as not to obstruct the safe and convenient use of the highway," the obligation of the company was held not to be limited to the original construction. "It must keep the railroad so constructed at all times. Its obligation so to do is continuing." *Wellcome v. Leeds*, 51 Me. 313.

The only case called to our attention holding the contrary doctrine is that of *Missouri, K. & T. R. Co. v. Long*, 6 Am. & Eng. R. Cas. 254. In *Burritt v. City of New Haven*, 42 Conn. 174, it is declared that the charters of corporations which confer exclusive privileges for the particular advantage of the grantees are to be construed liberally for the benefit of the public, and strictly as against the corporations, and that the duty of a railroad company, under its charter, to restore a highway to its former usefulness was not discharged when it restored it to a proper condition at the time the railroad was constructed, but the duty was a continuing one. The duty to maintain the usefulness of streets, under charters which did not in express terms impose the obligation to repair, was enforced in two Minnesota cases,—one reported in 36 N. W. Rep. 870, 34 Am. & Eng. R. Cas. 168 (*State v. Railway Co.*), and the other in 39 N. W. Rep. 154, 35 Am. & Eng. R. Cas. 250 (Ib).

In *Wood, Ry. Law*, it is stated that "the right to lay a railway track in a public street or highway carries with it the obligation not only to lay it in a proper manner, but also to keep it in repair;" and "if the statute simply provides that the company 'shall restore the highway to its former state of usefulness,' etc., they are invested with a discretion as to the matter, and are not subject to the control of the municipal authorities in this respect, and are liable for the consequences of a failure to discharge this duty, and are also charged with the further duty of keeping that part of the highway in a proper condition. In other words, the obligation imposed upon them in this respect is a continuing one, and they must so restore the highway that its use by the public shall not be materially interfered with, and so that it shall not be rendered less safe or convenient, except in so far as diminished safety and convenience are inseparable from its use by the railroad: and the question whether or not the company has discharged its duty is a question of fact for the jury." See volume 2, § 269, p. 970, note 1, and page 976.

In the case of *Railroad Co. v. Dyer Co.*, 3 Pickle (Tenn.), —,

it was held that where a railroad company makes a cut through a public highway, and builds a bridge over its road, the law imposes upon it the continuing duty of repairing the bridge, although its charter did not expressly so require, but simply by its express terms imposed the duty of restoring the highway to its former state of usefulness. These rules, laid down in respect to steam-railway companies, apply, not only to crossings, but to the entire road-bed of street-railway companies; for their occupation of the street is held not to be a new burden upon the street, or a diversion of its use as a highway, for the reason that such occupation is assumed to be entirely compatible with the use by the public. This is based upon the idea that a street railway, properly constructed and maintained, is not an obstruction, though it may be an inconvenience. When it is so constructed or maintained as to become an obstruction, it ceases to preserve the character upon which its grant of rights in public highways is predicted. The charter of this company shows that it was intended that the space occupied by it should be used by the public as a highway, the right of way being given to defendant's cars. It is its common-law duty to keep the space of the highway occupied by its road-bed (which extends at least to the ends of its cross-ties) properly graded and in good repair, so as not to be any obstruction to travel across the road-bed, or longitudinally upon it, and also to keep the crossings where its road-bed is traversed by streets in good repair. The judgment is affirmed, but the fine against the company is reduced to \$50. The cause is remanded for further proceedings, and defendants are given 60 days from rendition of this judgment to abate the nuisance in accordance with the rule laid down in this opinion; and, if they shall fail therein, then the obstructions shall be removed under orders from the lower court.

Street Railways—Obligation to Repair Streets.—By constructing and operating a street railway under an ordinance which grants the privilege of doing so, but provides that the company shall keep in repair that part of the street between the rails, the company becomes bound to keep that portion of the street in repair. *City of Columbus v. Columbus St. R. Co.* (Ohio), 32 Am. & Eng. R. Cas. 292. See also *Frankford & S. P. C. P. R. Co. v. Philadelphia* (Pa.), 25 Ib. 262. By the acceptance of a charter which contains a provision requiring the company to keep its track and adjacent part of the streets at all times well paved and in good order, the company is estopped to object to the validity or legality of the provision. *District of Columbia v. Washington & G. R. Co.* (D. C.), 4 Am. & Eng. R. Cas. 161.

When a street-railway company is organized under a statute which provides that privileges acquired thereunder may be regulated, withdrawn, or subjected to the imposition of new conditions, and receives a charter from a city authorizing the construction of a street railway but requiring it to pave between the rails, a subsequent statute requiring street-railway companies to pave one foot on each side of the rails is a valid exercise of

the reserved right to alter the franchise. *Sioux City R. Co. v. Sioux City (Iowa)*, 36 Am. & Eng. R. Cas. 143.

A municipal ordinance allowed a street railway to double its track throughout a certain street, but stipulated that it should thereafter bear all the expense of repairing so much of the street as was occupied by its tracks, and should relay its tracks in the middle of the street. *Held*, that the ordinance applied to the whole street; and that if the company availed itself of the permission in part, it accepted the conditions in full and lost the benefit of former exemptions and privileges that were inconsistent with it. *City of Detroit v. Detroit St. R. Co.*, 37 Mich. 558.

Same—Extent of Obligation.—To fulfil an obligation to keep a street in repair, the company must keep it in such condition that the ordinary and expected travel of the locality may pass with reasonable ease and safety. *McMahon v. Second Ave. R. Co.*, 75 N. Y. 231.

A street railway agreed "to pave the streets in and about the rails of its track in a permanent manner, and to keep the same in repair to the satisfaction of the street commissioner." *Held*, that the company was bound to maintain the street between the rails, and also so far outside as the street surface was disturbed in the act of laying the track. *McMahon v. Second Ave. R. Co.*, 75 N. Y. 231; *Mayor, etc. v. Second Ave. R. Co. (N. Y.)*, 26 Am. & Eng. R. Cas. 546.

When the statute which imposes upon street-railroad companies the obligation of keeping certain portions of the street in repair defines such portions as the "space between the rails," the company is only required to keep in repair that part of the street lying between the rails along which the cars run and between which the horses travel. It is not required to keep in order that part of the street lying between double tracks. *Robbins v. Omnibus R. Co.*, 32 Cal. 472. A requirement in the charter of a street-railway company that it should "keep the surface of the street inside the rails and two feet four inches outside thereof in good order and repair" means the full length of two feet four inches on each side of the track. *People v. Fort St. & E. R. Co.*, 41 Mich. 413.

The charter of a passenger-railway company provided that it should not occupy certain streets without the consent of the city councils, and that it should keep so much of the streets as it should use in perpetual good repair. The borough, in an ordinance giving consent to the construction of the railroad, required that the street in which it was laid should be kept "in perpetual good order and repair from curb to curb its whole length." *Held*, that under the charter and ordinance, the company was bound to keep the street cleansed from the dirt and filth necessarily or casually accumulating thereon by its ordinary use as a public thoroughfare. *Pittsburgh & B. R. Co. v. Birmingham*, 51 Pa. St. 41.

A corporation was empowered, subject to the consent of the city councils, to construct a street railway, but was bound to keep so much of the streets "from curb to curb, as may be used by them, in perpetual good repair." The councils assented to the construction of the railway on condition that the company should keep the streets in a good and sufficient state of repair and "in a reasonable sanitary condition." By an extraordinary rain, rocks, stone, etc., were washed down a ravine situated on one side of the street, eight or ten feet in depth and 100 feet in length. *Held*, that the railway company was bound to remove the deposit from the street. *Pittsburgh Pass. R. Co. v. City of Pittsburgh*, 80 Pa. St. 72.

Same—Paving and Grading Streets.—An obligation, contained in the charter of a railway company, to keep a street in repair does not impose upon the company any obligation to repave it with new and different material. *City of Baltimore v. Scharf (Md.)*, 10 Am. & Eng. R. Cas. 241; *City of Chicago v. Shelden*, 9 Wall. (U. S.) 50. Accordingly it has been

held that an ordinance of a city, giving the privilege of using its streets for a horse railway, and which contains a provision requiring the company to maintain the space between its rails and for two feet on either side in good repair, does not bind the company to pave with stone blocks a street hitherto only macadamized. *State v. Corrigan Consolidated St. R. Co.* (Mo.), 29 Am. & Eng. R. Cas. 591. It has also been held that a statute directing that a street-railroad company shall repave the streets, etc., does not authorize the city to require that the pavement shall be made of wood. *City of Philadelphia v. Empire Pass. R. Co.*, 7 Phil. (Pa.) 321; s. c., 3 Brew. Eq. (Pa.) 570.

But in Ohio a different view seems to have been adopted, and it has been held that, under an ordinance granting the privilege of constructing a street railway, but providing that the company shall keep the street in good order and repair between the rails, the city may rightfully determine the kind of pavement that should be constructed and maintained in the street including that part between the rails. *City of Columbus v. Columbus St. R. Co.* (Ohio), 32 Am. & Eng. R. Cas. 292. So, too, where a charter provided that the company should keep its tracks at all times well paved and in good order, and that nothing therein contained should prevent the city at any time from altering the grades or otherwise improving the respective streets occupied by the road, and that in such event it should be the duty of the company to change its railroad so as to conform to the grades or paving, it was held that the company was bound not only to pave designated portions of the streets, but also to repair the paving and change the grade and lay new pavements whenever the municipality should see proper to make changes in the streets. *District of Columbia v. Washington & G. R. Co.* (D. C.), 4 Am. & Eng. R. Cas. 161.

Under an ordinance requiring a street-railway company to "keep the surface of the street inside the rails and for two feet four inches outside thereof in good order and repair, provided, however, that upon the paved portions of said streets the materials for repaving shall be supplied at the expense of the city," where the city directs the company to raise and repair that portion of the pavement which is within the rails, at a time when it had become so worn and dilapidated that a reconstruction with new materials was essential, the city is bound to bear the expense of the materials. Such repairs amount to repaving within the meaning of the proviso. *Fort Wayne & E. R. Co. v. City of Detroit*, 34 Mich. 78.

A street-railway company was required by ordinance to keep the pavements on its road in good repair, and it was the duty of the city to furnish material. The company, being directed to make repairs, asked the city government for leave to repave with cobblestone, and the city refused to furnish any kind of material but made no objection to cobblestone and offered no suggestions. *Held*, that the company might use any fit material and maintain an action against the city for its value. *Fort Wayne & E. St. R. Co. v. City of Detroit*, 39 Mich. 543.

An obligation by a street-railway company that it "shall at all times keep the roadbed, etc., in good repair, and shall keep said road up to the level of the streets; in no case shall said road be above or below the city grade of the streets after said street shall have been graded by the city," does not oblige the railroad company to fill up the streets beneath its track so as to keep its roadbed on a level with the street on each side of the track. The company is bound to keep the road in good repair, and to conform and keep the level of the roadbed to that of the streets when graded, and is not bound to contribute to the expense of grading the street. *Galveston v. Galveston City R. Co.*, 46 Tex. 435; *Galveston City R. Co. v. Nolan*, 53 Tex. 139.

Same—Power of City to Make Repairs at Company's Expense.—If a street

railway company neglects, in terms of its obligation, to repair the street, the city authorities may obstruct the street and proceed to make the necessary repairs themselves. *Philadelphia & G. F. R. Co. v. Philadelphia*, 11 Phil. (Pa.) 358.

When, after notice, a street-railway company which is bound to keep the street in repair falls to do so and the city causes the work to be done, its reasonable cost may be recovered by action against the company. *City of Columbus v. Columbus St. R. Co.* (Ohio), 32 Am. & Eng. R. Cas. 292. Where a city has made repairs which the company was bound but has neglected to make, and has proceeded in the usual way, and no fraud is shown, nor any facts to impeach the reasonableness of the account, the sum actually expended in the work is *prima facie* the measure of the city's recovery. *Mayor, etc. v. Second Ave. R. Co.* (N. Y.), 26 Am. & Eng. R. Cas. 546.

A city passed an ordinance providing that the defendant, a street-railway company, should at all times keep its road in good repair and upon a level with the street, and should pay all expenses of filling, grading, laying, paving, or otherwise changing, improving, or maintaining the street between its tracks, and, failing to do so, the city should have the right to do the same, and recover of the company the cost of the work. *Held*, that the city could not, under this ordinance, recover for filling, grading, and paving part of the street between defendant's tracks, upon which the railroad was not built at the time such improvements were made merely because the company afterward established its tracks on the said street: *Gulf City St. R. & R. E. Co. v. City of Galveston* (Tex.), 32 Am. & Eng. R. Cas. 300.

Same—Mandamus to Compel Company to Repair.—A city railway company bound by its act of incorporation to keep its track in repair may be compelled by *mandamus* to do so. *Halifax v. City R. Co.*, 1 Russ. & Ch. Eq. (Nova Scotia) 319.

Same—Liability of Company to Indemnify City.—The fact that a street railway is bound to keep the street in repair does not absolve the city from the duty of keeping its streets in a safe and proper condition. *People v. City of Brooklyn*, 65 N. Y. 349. And when the company fails to do so, the city may recover from the company all damages incurred by reason of the company's neglect. *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475.

In an action against a street-railroad company to recover damages paid by the city to a person injured through the neglect of the company to keep the street in repair, the proper measure of damages is the amount of the judgment recovered against the city if the city has notified the company to defend the suit. *Brooklyn v. Brooklyn City R. Co.*, 57 Barb. (N. Y.) 597.

When a street-railroad company undertakes to keep the streets "in thorough repair within the tracks and three feet on each side thereof with the best water-stone under the direction of such competent authority as the common council might designate," the designation of a competent authority by the city to see that the street is kept in repair is not a condition precedent to a breach of the company's obligation. *City of Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475.

Same—Liability of Company to Persons Injured by Reason of Defects.—If a street-railway company which is bound to keep the street in repair negligently fails to do so, an action to recover damages may be maintained against it by a person injured in consequence of such failure. *McMahon v. Second Ave. R. Co.*, 11 Hun (N. Y.), 347; *Conroy v. Twenty-third St. R. Co.*, 52 How. Pr. (N. Y.) 49.

Same—Repeal of Provision in Charter—Constitutional Law.—By its

charter, the Ridge St. R. Co. was required to keep the several streets and avenues traversed by its road in perpetual repair. The company had entered in an agreement with another company by which they were consolidated under the name of the Ridge Ave. R. Co. Thereafter an act was passed entitled "An Act relating to the Ridge Ave. R. Co.," which, after confirming the consolidation of the companies above named, declared that the new company should be empowered to use and maintain the rail-ways constructed by the former companies, and provided certain rules for the government of the company, imposed certain duties, and conferred certain powers. The act finally declared that "all provisions in the charters of the two companies so consolidated as above mentioned not included in this act are hereby repealed." The act contained no provision relating to the repair of the streets. *Held*, that under the provision of the Pennsylvania Constitution that no bill should contain more than one subject, which should be clearly stated in its title, the repeal of the provision relating to the repair of the streets was unconstitutional and void. *Ridge Ave. Pass. R. Co. v. City of Philadelphia*, Pa. Sup. Ct., Feb. 11, 1889.

SHEPHERD

v.

BALTIMORE AND OHIO R. CO.

(130 U. S. 426.)

Eminent Domain—Property Injured but not Taken—Ohio Statute.—Under the provision of section 3283, Ohio Rev. Stat., that every railroad company occupying a street or other public ground under an agreement with the municipal or other authorities, "shall be responsible for injuries done thereby to private or public property lying upon or near to such ground," the right to recover damages for such injuries is not limited to the owners of property immediately upon the street occupied by the track, or other structures of the railroad company, but extends to the owners of property which is "near to" any public street thus occupied.

Same—Obstruction of Street During Construction—Special Damages.—Temporary injury sustained by a property-owner on account of the obstruction of a street during the construction of a railroad is not injury done to the property itself within the meaning of the Ohio statute, but special damages arising therefrom constitute a cause of action apart from any claim under the statute.

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

This action was brought to recover damages for injuries alleged to have been done by the defendant in error to certain improved lots on Union street, in Bellaire, Ohio, of which the plaintiff in error, who was the plaintiff below, claims to be the owner. It is based upon § 3283 of the

Case stated.

Revised Statutes of Ohio, which provides: "If it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, way, or ground of any kind, or any part thereof, the municipal or other corporation or public officers or authorities, owning or having charge thereof, and the company may agree upon the manner, terms, and conditions upon which the same may be used or occupied; and if the parties be unable to agree thereon, and it be necessary, in the judgment of the directors of such company, to use or occupy such road, street, alley, way, or ground, such company may appropriate so much of the same as may be necessary for the purposes of its road, in the manner and upon the same terms as is provided for the appropriation of the property of individuals; but every company which lays a track upon any such street, alley, road, or ground shall be responsible for injuries done thereby to private or public property, lying upon or near to such ground, which may be recovered by civil action brought by the owner, before the proper court, at any time within two years from the completion of such track." Rev. Stats. Ohio (ed. 1880), 851. This is, without material change, the first section of the act of April 15, 1857, entitled "An act to amend the act entitled 'An act to provide for the creation and regulation of incorporated companies in the state of Ohio,' passed May 1, 1852, and to regulate railroad companies." Laws of Ohio, 1857, 133.

The lots in question are situated on the west side of Union (formerly Water) street, thirty-three feet south from Thirty-first (formerly First) street, and extend back one hundred and twenty feet to an alley, running from Crescent street to Thirty-first street. Upon the lots is a two-story brick building, the first floor being used as a dry goods store and the rest of the building as a hotel. The railroad company—with the assent, as we assume, of the municipal authorities of Bellaire—constructed its road in Thirty-first street, upon arches springing from stone pillars about twenty-seven feet apart, each pillar being twelve feet long, six feet thick, and thirty feet high. Two of the pillars are in Union street, at the intersection of that street with Thirty-first street, each of them extending fifteen inches within the line of the sidewalk on each side of the roadway of Union street, through Thirty-first street. It took from three to four years to build the railroad in the latter street. During that period Union street for about one hundred feet south from Thirty-first street towards Crescent street (which is parallel to and the next street south from Thirty-first street) was obstructed by stone, timber, rock, derricks, steam engines, barrels, guy-ropes, etc., such obstructions extending in front of and past the lots in question. For a great part of the time the railroad was being built teams could not get to the

property because of these obstructions, and at times persons could hardly get to it or pass by it on foot. Before the railroad was built in Thirty-first street the property was worth from \$9000 to \$10,000, the store bringing an annual rent of from \$400 to \$500, and the whole building \$1000; afterwards it was not worth more than from \$4000 to \$5000 and the rental was reduced one half.

These facts having been proven by a witness on behalf of the plaintiff, subject to objection to their competency, the court, on motion of the defendant, excluded from the consideration of the jury so much of the evidence as related to the depreciation of the value of the property by reason of the above obstructions, and all the testimony relative to the diminution of its rental value.

The plaintiff then made a formal offer to prove that the building of the railroad in Thirty-first street was in progress three or four years, during which time the company obstructed Union street, in front of his property, with materials of all kinds used in building the railroad, so that access to his property was seriously obstructed; that because of such obstruction his tenants occupying the premises left them, and he was unable to rent them, and by reason thereof he lost their rental value, amounting to at least two thousand dollars; that access from Thirty-first street to the alley in the rear of his property was entirely cut off during the building of the railroad; that the alley was too narrow for teams coming in from the other direction to turn, and that he had a stable at the rear of his property and abutting on the alley, which became entirely untenable during the construction of the railroad; that the building of the pillars and the archway connecting the same at the intersection of Union and Thirty-first streets damaged the access to his property from Union street, and the building of the railroad in Thirty-first, street west of Union street, damaged his access to his property through the alley in the rear, and depreciated its market value in the sum claimed in the petition. The court refused to admit this proof, and ruled that damages to the rental value of the property were not recoverable in this action, nor damages resulting from the placing of obstructions on Union street in front of the property, during the time of the building of the railroad, and that no recovery could be had by him for damages to his property by reason of the building of the railroad in Thirty-first street.

The court further decided that § 3283 of the Revised Statutes of Ohio does not enlarge or extend the liabilities of railroad companies, but only preserves the right of property-owners to recover for injuries done to their property by the building of railroads under agreements made with municipal or other corpora-

tions or public officers or authorities, as provided in that section, precisely as if no such agreements had been made.

These rulings having been made, and duly excepted to by the plaintiff, the court, on defendant's motion, gave a peremptory instruction to the jury to return a verdict in its behalf, which was done.

John W. Herron for plaintiff in error.

Hugh L. Bond, Jr., and E. J. D. Cross for defendant in error.

HARLAN J.—The express requirement that every railroad company occupying a street or other public ground, under an agreement with the municipal or other authorities, owning or having charge thereof, "shall be responsible for injuries done thereby to private or public property, lying upon or near to such ground," leaves little room for construction. The right to recover damages for such injuries is not limited to owners of property immediately upon the street occupied by the track or other structures of the railroad company. If the legislature had intended to restrict the right of action given by the statute to owners of the latter class of property, the words "or near to" would not have been used. The manifest purpose was to place those whose property was "near to" any public street thus occupied upon an equality, in respect to the right to sue, with those whose property abutted on the street.

In Columbus, Springfield, etc. *R. v. Mowatt*, 35 Ohio St. 284, 287, which was an action to recover damages for injuries to private property not immediately upon the street occupied by the railroad track, the court held the limitation of two years prescribed by the statute to be applicable, because the street was occupied under an agreement with the municipal authorities, and because the premises were "near to" that street. But an adjudication more directly in point is *Railway Co. v. Gardner*, 45 Ohio St. 309, 318, 30 Am. & Eng. R. Cas. 409, which was made after the decision in the court below of the case now before us. The property there alleged to have been injured was immediately upon the street in which the railroad track was maintained under municipal authority. Referring to *Parrot v. Cincinnati H. & D. R. Co.*, 10 Ohio St. 624, as not controlling the case then before the court, it was said: "For, whereas the court declares in that case that the owner of such lot has no more right to recover damages of the company than any citizen who resides, or may have occasion to pass, so near the street and railroad as to be subjected to like discomforts, the act in question expressly authorizes an action and recovery for injuries done by

Statute gives
right to com-
pensation
when property
"near to"
street.

Authorities
examined.

laying a track upon any such street or ground to private or public property 'lying upon or near to the street or ground upon which the track is laid.' It seems that to entitle a property-owner to recover for injury to his property, it need not necessarily be situated upon the street occupied by the track. The statute reaches beyond the decision in prescribing a remedy for a party whose property is injured by the location and operation of a railroad track through the street by a railroad corporation. . . . The provision in force at the time of the injury complained of in that case, of which § 3283 is an amendment, created no such remedy for land-owners as we were considering."

This interpretation of the statute is, in our judgment, the only one justified by its words, although it may sometimes be difficult to determine whether particular property, alleged to have been injured by the placing of a railroad track or structure in a public street, is, within the meaning of the statute, "near to" that street. It is certain, however, that property is "near to" the street, so as to entitle the owner to avail himself of the remedy given by the statute, if the injury to it is the direct and necessary result of the occupancy of the street by the track or other structures of a railroad company. And an injury for which the company is liable, under the statute, arises when the diminution of the value of the property can be fairly attributed to such occupancy and use of the street. In *Grafton v. Baltimore & Ohio R.* 21 Fed. Rep. 309, 17 Am. & Eng. R. Cas. 200, which was an action under this statute for injury done by the obstructions here in question, Mr. Justice Matthews said: "There does not appear to be any ground, in the words or intention of the act, for a distinction between temporary injuries to the use, and permanent injuries to the value, of the property injured; and, in the absence of any ambiguity, the statute must be taken to mean what it plainly says; and, there being no sufficient reason to the contrary, must be so construed that the railroad company, in the case contemplated, shall be held responsible for all injuries of every description done by its work to the property of the plaintiffs." It is scarcely necessary to say that the same rule as to compensation must be applied in the case of property "near to" any street so occupied by a railroad company. The injury, in a case of that kind, may not, in every case, be easily ascertained, but the right of the owner, under the statute, to full compensation for it, is as clear as is the right of the owner of property abutting on the street, to be compensated for any substantial injury resulting from its occupancy by a railroad.

One of the questions discussed at the bar was as to the right

of the plaintiff to recover damages in this action on account of the obstructions placed in Union and Thirty-first streets during the buildings of the railroad, where-
Temporary damage is not within the statute. by access to his property by way of Union Street, as well as through the alley in the rear, was materially obstructed. We are of opinion that the temporary injury sustained by the plaintiff on account of such obstructions cannot properly be said to have been done to the property itself, within the meaning of the statute. The inquiry in every case, under the statute in question, is, whether the property alleged to be injured has been depreciated in value by reason of the street being occupied by a railroad company, and that question is solved by ascertaining the difference in its value before and its value after the final location and construction of the railroad. *Railway Co. v. Gardner*, 45 Ohio St. 309, 322, 30 Am. & Eng. R. Cas. 409. The authority given to the railroad company to place its track in Thirty-first street carried with it authority to obstruct its use temporarily, so far as the building of the track required it to be done. The rule, in Ohio, applicable in such a case is thus stated in *Clark v. Fry*, 8 Ohio St. 358, 373: "The right of transit in the use of public highways is subject to such incidental, temporary, or partial obstructions as manifest necessity may require," and among those are the temporary impediments necessarily occasioned in the building and repair of houses on lots fronting upon the streets of a city, and in the construction of sewers, cellars, drains, etc. "These are not invasions, but qualifications of the right of transit; and the limitation upon them is that they must not be unnecessarily and unreasonably interposed or prolonged."

But the plaintiff's special damages, if any, on account of such obstructions, constituted a cause of action apart from his claim, under the statute before us, for damages on account of the depreciation of the value of the property itself, as the result of the permanent occupancy of the street with a railroad track. And here the point is made that the petition is not so framed as to cover those special damages. In this view we do not concur. Its allegations are broad enough to admit evidence in support of the claim for damages on account of any unnecessary obstruction of the plaintiff's access to his property during the building of the railroad track in Thirty-first street, as well as of the claim for injury done to the permanent value of the property. The plaintiff could have been required to separately state his two causes of action, but no motion to that end having been made in the court below, that objection was waived. *McKinney v. McKinney*, 8 Ohio St. 423; *Hartford Township v. Bennett*, 10 Ohio St. 441, 443; Civil Code, Ohio, §§ 80, 81, 86. Nor, so far

Special damages arising from obstruction during construction give cause of action.

as the record shows, were the rulings of the court below based in any degree upon the ground that the petition did not sufficiently set forth a separate cause of action for special damages on account of the temporary obstructions referred to.

The point was pressed at the bar, that, as no proof was introduced by the plaintiff to overcome the denial by the defendant in its answer of his ownership of the property in question, any errors committed by the court as to other issues made by the pleadings are immaterial, since the peremptory instruction was proper in view of the plaintiff's failure to prove his ownership. This objection is too technical and cannot be sustained, as the property is repeatedly referred to in the record as being owned by the plaintiff, and the court so assumed in its rulings. After the exclusion of competent evidence introduced and offered in behalf of the plaintiff upon the issue as to the injury done to the property, his ownership being unquestioned except by a formal denial in the answer, and the issue as to the injury being treated as the real point of inquiry, we ought not to affirm for the want of affirmative proof in the record of such ownership.

It results from what we have said that the plaintiff was entitled to go to the jury upon the issue as to the damage he sustained, if any, by reason of the access to his property during the construction of the track being unnecessarily and materially obstructed by the company, as well as upon the issue as to the depreciation, if any, in the value of his property, as the direct and necessary result of the permanent occupancy of Thirty-first street by the track and structures of the company. Evidence was offered which tended to support those issues, upon his part, and was improperly excluded.

The judgment is reversed with directions for a new trial, and for further proceedings consistent with this opinion.

Eminent Domain—Injuries to Property Adjacent to Track.—Where town lots abut upon a street, along which a railroad is constructed, so near as to cause an embankment in the street, upon either side of the lot, so as to deprive the lot-owner of the free use of the streets adjacent to and abutting on the lot, the lot being thereby depreciated in value, to the damage of the owner, he may recover his damages from the railroad company, even though no part of the lot be taken, and no part of the street in front thereof be occupied by the railroad. *Chicago, K. & N. R. Co. v. Hazels*, Neb. Sup. Ct., April 17, 1889. The court said: "In *Gottschalk v. R. Co.*, 14 Neb. 550, it was decided that where a lot abuts upon an alley upon which a railroad is built, if the owner of the lot sustains damage in excess of that shared by the public generally, he may recover if he is deprived of a public right which he enjoyed in connection with his property. In the opinion it is said: 'It is not necessary to entitle a party to recover that there should be a direct physical injury to his property, if he has sustained damages in respect to the property itself, whereby its value has been permanently impaired or diminished. This is but justice.' To that extent we must consider the law of this state settled. In *Railroad Co. v. Reinhackle*, 15 Neb.

279, it was held that the authorities of a city could not authorize a railroad company to permanently appropriate and obstruct a portion of the street without compensating all the property owners abutting thereon, if especially injured thereby. In that case it is said that although the fee of streets is in the public, yet it is held in trust for public use. 'The municipal corporation cannot sell or permanently obstruct the streets without compensation to the owners of property specially injured thereby. The trust, like any other, must be exercised in good faith. It was created to give permanency to streets, and apply them wholly to the use of the public. But, in addition to the public benefit, every lot owner whose lots abut on a street has a special interest therein distinct from the public at large. Unless the owner can have free and unobstructed access to his property it will be of but little value.' See, also, *City of Omaha v. Kramer*, 41 N. W. Rep. 295.

"In *Railroad Co. v. Fellers*, 16 Neb. 169, it was held that where real estate was damaged by the construction of the railroad, but no part thereof was appropriated to the use of such road, an action might be maintained against the railroad company for such damages. In that case, while no part of Feller's property was taken, yet it was surrounded or inclosed within what is commonly termed a 'Y,' being depreciated in value by the construction of the road across and over adjacent property and streets. It has been substantially and uniformly held by this court that the provisions of the constitution giving compensation to the owners of property damaged for public use shall be given a reasonable and practical construction, and that where property is rendered of less value by the construction of a public improvement of the kind mentioned the owner shall have 'just compensation therefor.' The amount or extent of damage is a question of fact for the jury."

IRON MOUNTAIN R. CO.

v.

BINGHAM *et al.*

(*Tennessee Supreme Court, May 7, 1889.*)

Street—Title to Fee—Boundary in Deed.—When a deed calls for the side of a street, the grantee therein acquires no title to the fee of any part of the street.

Same — Construction of Railroad — Injury to Abutting Property — Compensation.—When a railroad company has been authorized by the municipal authorities to construct its track in a street, an abutting lot-owner who has no title to the fee of the street cannot claim damages for injuries which merely result from the legal and reasonable use of the street by the railroad company, but do not affect his right of egress and ingress.

Same — Change of Grade by Railroad Company under Contract with the City.—A municipal corporation is not liable for injury to adjoining property caused by the lawful exercise of its power to grade a street, and, when a railroad company, in fulfillment of a contract entered into by it with a city, makes such alterations in the grade of a street as are necessary to fit it for public use, an abutting lot-owner injured thereby has no claim against the company.

Same — Obstruction of Egress and Ingress — Evidence. — The width of a street between the curbing was forty-five feet. Two railroad tracks were laid in the centre of the street, the space between each outer rail and the curbing being twelve and a half feet. The rails were so laid as to be flush with the surface of the street. About fourteen regular trains used the tracks each twenty-four hours. The evidence showed that since the tracks were laid and the street had been paved by the railroad company, its use for ordinary traffic had greatly increased in spite of the dangers and inconvenience incident to the movement of the trains. *Held*, that no such interference with the right of egress and ingress to an abutting lot was shown as entitled the owner to recover damages.

Same—Nuisance—Unlawful Use of Street by Railroad Company.—Plaintiff claimed to recover damages on the ground that the railroad company so used the track in a street as to create a nuisance. The evidence showed that the switching complained of had for the most part occurred upon another part of the street, and not in front of plaintiff's premises; that trains had occasionally been run at a rate of speed in excess of that allowed by law; and that a good deal of whistling and bell-ringing had been done; but it was not shown that it was unnecessary to the safe movement of trains. The smoke and steam complained of did not appear to be more than that incident to the usual operation of a railroad. No special damage was shown to have resulted from any of these occasional abuses. *Held*, that plaintiff was entitled to recover only nominal damages.

APPEAL from Circuit Court, Shelby County.

Morgan & McFarland for plaintiffs.

Turley & Wright for defendant.

LURTON, J.—Mrs. Bingham is the owner of a block of lots fronting on Sixth street, Memphis, upon one end of which she has erected four frame dwelling-houses. At the time she sustained the damage for which she sues she Case stated. was in receipt of a monthly rental of \$40 from these houses. After her property had been thus improved, Sixth street, including that part in front of her tenements, was occupied by the Iron Mountain R. Co., by the construction thereon of two railway tracks over which it passes its trains in reaching its depot in the city. This suit was brought by her to recover damages sustained by her property in consequence of this use of the street by the railroad company. Her grounds of action are elaborately stated in her declaration, but, for convenience in treatment of the many important questions presented, we will classify them under four distinct heads: (1) Damages consequent upon the lawful and necessary use of a public street for railroad purposes; (2) damages consequent from the grading of the street by the railroad company; (3) damages by obstruction of her right of ingress and egress by lawful occupation and user of street by railway company; (4) damages resulting from excessive and unnecessary and unlawful use of the street in front of her premises, and amounting to a nuisance. A jury being waived, the cause was determined by the circuit judge, whose

special findings of law and fact are in the transcript, and judgment was rendered for plaintiff below for the sum of \$2000. His honor, the trial judge, found no special damages under the fourth classification, but did find that the depreciation in the value of Mrs. Bingham's property by reason of the construction and operation of a railroad upon a street in front of her premises was the sum of \$2000. What part of this sum he found to be the consequence of the mere use of the street by the railway company, or of the grading of the street, or of obstruction to her easement in the street, we are left to conjecture, for his honor has failed to make any separate findings of law or fact as to either of these matters, though requested so to do.

The deed under which Mrs. Bingham holds her property calls for the side of Sixth street. The general rule undoubtedly is that a deed which merely calls for a highway or street carries title to the centre thereof. This rule is an analogy to the doctrine that a grant calling for a stream not navigable carries title to the middle or thread of the stream. But where from the language of the grant it appears that the bank of the stream is intended to be the boundary, the title will be confined within the intended limits. So, if from the terms used it appears that the intent was to convey only to the street, such intent will be given effect. Such a conveyance as the one under which Mrs. Bingham holds, calling for the side of the street, has been frequently construed as not carrying the fee to the centre of the street or highway. *Spain's Case*, Thomp. Tenn. Cas.; 3 Washb. Real Prop. side p. 635, and note; 2 Smith, Lead. Cas. side p. 216. When the public have but a servitude in the street, the fee being in the abutter, the occupation of the street by the tracks of an ordinary steam-railway seems, by the decided weight of authority, to be regarded as a new and distinct servitude imposed upon the fee, and, if done without the consent of the owner, is a taking of his property for public uses within the constitutional provision requiring compensation. 6 Am. & Eng. Encyc. Law, 552, and cases cited. A correct interpretation of the deed under which Mrs. Bingham holds her property must confine her to the side of the street, and excludes the fee of the highway altogether. No part of her freehold having been taken or occupied by the railway company, her damages must be limited to such injuries as she can show herself to have sustained as the owner of a mere easement in the street in front of her premises.

What injury has she sustained by reason of the use made of this street for which she is entitled to recover damages? The railroad is not a trespasser upon this street. The tracks now upon the street are there under license and authority from the city government. "The right of the legislative power," says

Plaintiff has
no title to fee
of street.

Judge Wright in the case of *Tennessee & A. R. Co. v. Adams*, "to authorize the building of a railroad within a town or city, or upon a street or other public highway, is not now to be doubted." 3 Head. (Tenn.) 598; *Railroad Co. v. Mayor, etc.*, 4 Cold. (Tenn.) 414.

The power of the legislature to delegate to the municipal governments the right to license the use of a public street for railway purposes can no more be questioned than the first proposition. 2 Dill. Mun. Corp. §§ 519, 558-560 inclusive. The authority conferred by the law creating the peculiar local government of the city of Memphis is abundant to sustain the contract between the city and the plaintiff in error. The railroad company, in so far as its occupation and use of this street is permitted by its contract and the taxing district ordinances, is not a trespasser. What the law expressly authorizes is not unlawful, and cannot be regarded as a nuisance. The running of railroad trains along a public street devoted to residential purposes, and without any actual obstruction of the right of an abutting owner to light or air, or ingress and egress to and from his premises, may in most cases be regarded as injurious to the property of lot-owners. A resident upon such a street will undoubtedly be subjected to more or less discomfort and inconvenience by the mere passage of trains in front of his premises. Unpleasant odors and disagreeable noises at inconvenient hours are likely to be experienced. Life will not be altogether so comfortable. But does the law give damages for such consequential injuries? To entitle a plaintiff to recover damages there must not only be an injury, but the injury must be the result of some wrongful conduct. Where an injury results merely from the lawful and reasonable use of a neighboring estate, no wrong is done and no remedy exists. By the obstruction of a view, or of light or of air, or by the erection of an unsightly structure or the conduct of a lawful business, injury may be inflicted upon an adjoining property; but, as remarked by counsel, "in these and like cases there is an implied agreement by every one who is a member of civilized society that he will submit to such consequential injuries without action." The streets of a town or city are the property of the public, and the public, acting through their authorized agencies, may apply them to any public purpose not destructive of their use as public thoroughfares. The sound and well-settled rule is therefore that no action will lie by an abutting lot-owner, who does not own the fee in the street, for injuries which merely result from the legal and reasonable use of a public street by a railway company, and which leaves his right of egress and ingress reasonably sufficient. *Tennessee & A. R. Co. v. Adams*, 3 Head (Tenn.), 596; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62 :

Abutting lot-owner cannot recover damages for ordinary use of street by railroad.

Elizabethtown, etc., R. Co. *v.* Combs, 10 Bush (Ky.), 382; Danville, H. & W. R. Co. *v.* Com., 73 Pa. St. 29; Moses *v.* Pittsburgh, F. W. & C. R. Co., 21 Ill. 516; Chicago, B. & Q. R. Co. *v.* McGinnis, 79 Ill. 269; Porter *v.* North Missouri R. Co., 33 Mo. 128; Carson *v.* Central R. Co., 35 Cal. 325; Milburn *v.* Chicago, I. & N. R. Co., 12 Iowa, 246; Hatch *v.* Vermont Cent. R. Co., 25 Vt. 67. The text-writers, with one accord, seem to regard this a settled question. Pierce R. R. 234; 2 Wood Ry. Law, 727; 2 Dill. Mun. Corp. § 556; Cooley Const. Lim. § 555; 1 Ror. R. R. 515, 518; 6 Am. & Eng. Encyc. Law, 553, and cases cited.

The next element of damage to be considered is that resulting from the grading of the street, whereby the property of plaintiff in error has been left from two to five feet above the level of the street. The contract between the city and the railroad company required the latter to grade and pave Sixth street, and to put down curbing and sidewalks. The company was required to do this work in consideration for its use of the street, and to do it contemporaneously with the laying of the track. The grade was to be furnished by its city engineer, and the iron rails were to be laid flush with the street as graded. This grading and paving was done under the supervision of the city's own engineer, and the work is admitted to be in strict accord with the requirements of the contract, and to have required an expenditure of about \$30,000. Sixth street was but an old country road, never having been in any way improved or graded. The most substantial injury shown by the evidence, aside from the injuries purely the consequence of the lawful use of the street for railroad purposes, sustained by Mrs. Bingham, have resulted from the grading of the street in front of her premises. The right of a town or city to establish a grade for the public streets, and to cut down or fill up the streets to conform to such grade, is one of the most useful and important functions imposed upon such municipalities. To quote from the decision of this court in *Humes v. Knoxville*: "The corporation is the proprietor of the public streets of the town, which are held in trust as easements for the convenience of the citizens. As such proprietor the corporation has the power to grade, macadamize, or do anything else for the improvement of the streets whereby they may be made to answer the end for which they were designed; and if, in the exercise of this power, the property of any individual shall be rendered less valuable, either by being elevated above or depressed below the common level, it is *damnum absque injuria*,—a casualty to which his property is necessarily subject, and for which the corporation is not responsible, unless the injury has been inflicted either wantonly or from neglecting to use

Grading of street in proper manner does not give right to compensation.

reasonable diligence and care." 1 Humph. 408. This case is in accord with the line of decisions in other states, and has been more than once approved by this court. *Crawford v. Maxwell*, 3 Humph. (Tenn.) 477; *Memphis v. Lasser*, 9 Humph. (Tenn.) 760; *Nashville v. Brown*, 9 Heisk. (Tenn.) 6. The provisions of the Code contained in sections 1392, 1393, and 1394 are probably applicable alone to corporations created under the chapter in which they are found, but, even if of general application, they do not abrogate the rule as quoted, and do not affect any question in this case, no grade having ever been before established for this street, and there being no proof that Mrs. Bingham before building had applied to have a grade fixed. The case of *Gray v. Knoxville*, reported in 1 Pickle (Tenn.), 99, has been pressed upon us by the learned counsel for defendant in error as in conflict with the former decisions of this court. Turney, C.J., who delivered the opinion of the court in that case, in replying to the position assumed by the city, said: "If it was necessary for its public use that Asylum street should be so graded for its drainage as to throw surface water on the property of plaintiff, thereby injuring his cellars, walls, shrubbery, etc., and in the work of grading the fences were knocked or torn down, it would be a taking and application to public uses to that extent. . . ." 1 Pickle (Tenn.), 101. The decision limited to the case thus assumed is in no way inconsistent with our former adjudications, and is in accord with the leading case of *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 166. In the case now being decided, the grading of Sixth street having been done for the city and under its authority, the railroad company is not liable unless the city would be.

But it is insisted that the grade furnished the company by the city engineer had not been adopted by any official act of the legislative council of the city, and that, therefore, it is not a lawful grade, and that, therefore, the city and the company are jointly liable for all consequential damages. The declaration does not charge this grading to have been done illegally, or without municipal authority, and there is no proof whatever as to whether the grade established by the city engineer had been adopted by the municipal council. In this state of the record, and in view of the fact that the grading was done under a contract signed by all the members composing the legislative council, we will not assume that the grade furnished the company by the city engineer had not been officially adopted, in whatever mode was necessary to make it an official act. We therefore conclude that Mrs. Bingham is not entitled to any damages on account of the grading of this street, there being no pretence that it was done in an improper or negligent manner.

The next contention is that if it be conceded that the railway company has the legal right to maintain its tracks upon this street, and that it has been lawfully using these tracks for its usual and necessary business; that nevertheless this lawful use has so obstructed the right of ingress and egress as to amount to a destruction of her easement in the street. Excluding the sidewalks, the width of the street between curbing is 45 feet. The tracks are two in number, and are in the centre of the street. The space between each outer rail and curbing is 12½ feet. The iron rails are so laid as to be flush with the level of the street, and are therefore little obstruction to ordinary use of street. The clear space on either side of the tracks is wide enough for an ordinary vehicle, when the tracks are in use by the company. About 14 regular trains use these tracks each 24 hours. Thus the whole street is practically free and unobstructed for much the greater part of the time. The proof abundantly shows that since the tracks have been laid and the street paved its use for ordinary traffic has greatly increased, in spite of the dangers and inconveniences incident to the movement of trains. That the street may not be so safe or agreeable for driving as without the railroad tracks is not to be disputed. But that the mere right of egress and ingress which is appurtenant to every abutting owner on this street has been destroyed or materially obstructed is not proven by the facts of this case. The lawful and prudent use of the privileges conferred by the city upon this street to the railway company is not such as to amount in any sense to a taking of her right of easement in the public street, or to a substantial destruction of her rights therein. Not owning the fee in the street she has no right of complaint so long as her right of egress and ingress is reasonably sufficient, where the occupation of the street by the railway company is lawful.

We come now to consider the allegations in the declaration which charge an unlawful and improper use of the privileges accorded the railway company, under its contract with the city. The acts charged are that the street is used for ordinary switching purposes; that trains are run at a dangerous and illegal speed; that trains are unreasonably left standing upon the street, thus obstructing it, and that cars are packed upon the street, and engines suffered to make great and unnecessary noises; and that smoke, soot, cinders, and steam are unnecessarily thrown upon her premises,—by all of which illegal and unlawful conduct the operation of the road has become a nuisance, and greatly lessened the rental values of her property. These things, if proven, would constitute a nuisance, and entitle defendant in error to recover such damage as she may have sustained up to the

Evidence does not show obstruction of plaintiff's right of egress and ingress.

Unlawful and improper use of street by railroad not established.

bringing of her suit. When a railroad company has obtained legal authority to put its tracks upon a public street, it must so use its privilege as to do the least possible injury to abutting property-owners, and to the general public, who have an equal right upon the street. It must scrupulously avoid any violation of the contract under which its presence is permitted. The use of a street as a switch-yard would not be authorized by an authority to lay down and operate a track for ordinary railway purposes. So the unreasonable stoppage of trains on a street, or the packing of its cars on the street, and any unnecessary noise or smoke, would be acts in excess of the use accorded, and therefore illegal and a nuisance. Mr. Wood, in his work upon Railroads, lays down what we regard as the sound and reasonable rule, in the following words: "It may be stated as a general rule that whatever is authorized by statute within the scope of legislative powers is lawful, and therefore cannot be a nuisance. But this must be understood as subject to the qualification that, when an act that would otherwise be a nuisance is authorized by statute, it only ceases to be a nuisance so long as it is within the scope of the powers conferred. If the power conferred is exceeded, or exercised in another or different manner from that prescribed by law, it is a nuisance as to such excess and difference in the mode of its exercise. Whenever an act is authorized to be done in a highway that would otherwise be a nuisance, the person or company to whom the power is given is not only bound to exercise it strictly within the provisions of the law, but also with the highest degree of care, to prevent injury to persons or property of those who may be affected by such acts." 2 Wood, Ry. Law, 970.

The damages recoverable for such injuries as are now under consideration would of course be limited to such as have been sustained before the bringing of the suit. Being acts in excess of authority, and constituting a nuisance, their continuance ought not to be presumed. Diminution in value of her property could not be therefore looked to, though a loss of rental, if due to such nuisance, would be a proper element for consideration. In actions for damage springing from a nuisance, one recovery would not preclude a second suit if the abuse should be continued. This question has been more fully discussed in the case of *Harman v. Louisville, N. O. & T. R. Co.*, decided at this term, opinion by Special Justice Dickinson. The evidence upon this part of plaintiff's case is meagre and contradictory. Occasional acts of abuse, such as we have mentioned, are shown to have occurred. The switching complained of has for the most part occurred upon another part of the street, and not in front of her premises. Trains have occasionally been run at a rate of speed prohibited by the contract and by the city ordinances.

A good deal of whistling and bell-ringing has been done, but it is not shown that it was unnecessary to the safe movement of trains. The smoke and steam complained of does not appear to be more than that incident to the usual operation of a railroad. No special damage appears to have resulted from any of these occasional abuses. The circuit judge in his special findings says that he was unable to find from the proof any special or particular damage resulting from these unlawful acts. The plaintiff having however shown occasional acts in excess of the lawful use of this street under the contract with the city, is entitled to nominal damages. The judgment of the circuit court will be set aside, and judgment rendered here for costs and nominal damages.

Construction of Railways in Streets—Right of Lot-owners to Compensation.—See notes, 32 Am. & Eng. R. Cas. 251, and 36 Ib. 16, where the cases are collected. See also *Indiana, B. & W. R. Co. v. Eberle* (Ind.), 32 Ib. 220; *Denver & R. G. R. Co. v. Bourne* (Colo.), 32 Ib. 227; *Sheehy v. Kansas City C. R. Co.* (Mo.), 32 Ib. 233; *Pratt v. Des Moines N. W. R. Co.* (Iowa), 32 Ib. 236; *Texarkana & N. W. R. Co. v. Goldberg* (Tex.), 32 Ib. 240; *Columbus, H. V. & T. R. Co. v. Gardner* (Ohio), 32 Ib. 243; *Bulton v. Short-Route Ry. Transp. Co.* (Ky.), 32 Ib. 256; *Adams v. Chicago, B. & N. R. Co.* (Minn.), 36 Ib. 7; *Daly v. Georgia, S. & F. R. Co.* (Ga.), 36 Ib. 20.

Street—Construction of Railway In—Injury to Access—Compensation.—In *Smith v. Kansas City, St. J. & C. B. R. Co.*, Mo. Sup. Ct., March 23, 1889, the evidence showed that the railroad had received authority to lay its track in a street which had remained in its natural state without sidewalks, curbs, gutters, or any form of artificial grading. The ground was the natural prairie bottom of the Missouri river, and was quite irregular. The track was laid two or three feet above the natural level of the street, thereby practically cutting off access from the street to plaintiff's abutting lots. The city authorities had never established any grade by ordinance, but it was evident that the street would require to be graded in the near future. *Held*, that the plaintiff was entitled to recover actual and, in any event, nominal damages for the injury to the access to the lots, but that no recovery ought to be allowed as for permanent injuries; and that therefore plaintiff was entitled to recover actual damages, including any diminution of rental value to the time of bringing his action, but not for depreciation in the total value of its inhabitants.

Same—Payment of Compensation as Condition Precedent—Unopened Street.—Until compensation has been made to the owners of the land as required by art. 16, § 8 of the Pennsylvania constitution, a railroad company cannot construct its track on a street which has been laid out, but not opened, and its right to do so is not affected by the fact that the assent of the city has been obtained, and it has given bond to protect the city. *Appeal of Beidler*, Pa. Sup. Ct., March 25, 1889.

REICHERT *et al.*

v.

ST. LOUIS AND SAN FRANCISCO R. CO.

(Arkansas Supreme Court, June 1, 1889.)

Eminent Domain—Construction of Railroad in Street—Fee in Abutting Lot-owners—Ejectment.—When the fee of a street is in the abutting lot-owners, the fact that a railroad company has authority by statute and by municipal ordinance to construct its track upon the same constitutes no defence to an action brought by the lot-owners against the company to recover possession of the land, the use of the street for a railroad not being within the scope of the public easement.

Same—Acquiescence in Occupation of Street.—Where abutting lot-owners, who own the fee of a street, stand by during a period of three years after authority has been granted to a railroad company to construct its track in the same, they will be deemed to have acquiesced in the use of the street for railroad purposes, and will be estopped thereby from maintaining an action of ejectment against the company.

APPEAL from Circuit Court, Sebastian County.

Martin & McDonough for appellants.

Clayton & Forrester for appellee.

HEMINGWAY, J.—The appellants are the owners of certain lots in Fort Smith that abut on Ozark street. In 1883 the appellee constructed its railroad along the centre of the street, and since then has used it in running its trains. The appellants owning the lots, and therefore to the middle of the street, brought this action to recover possession of that part of the street occupied by the appellee's road-bed. The appellee answered in five paragraphs. The appellants demurred to the answer, and the court overruled the demurrer to the third and fourth paragraphs. The appellants "elected to stand on their demurrer," and the court dismissed their complaint, with costs. Case stated.

They allege, as grounds upon which to reverse the judgment, that the court erred in overruling their demurrer to the third and fourth paragraphs in the answer, which are as follows: "(3) Defendant, further answering, says that on the 2d day of January, 1883, the city council of the city of Fort Smith granted to it, by an ordinance passed by said council, the right of way over, along, and upon said street; that under and by virtue of said ordinance, and the provisions of its charter, it entered upon

and constructed its road-bed upon said street, and has continued to occupy the same in the manner and for the purpose contemplated by its charter and the said ordinance; that on the 1st day of March, 1883, the general assembly of the state of Arkansas passed an act validating and confirming said ordinance, and the right of the defendant thereunder, and defendant says its entry upon and use of said streets and premises as a right of way was and is not wrongful, and that plaintiffs are not entitled to have and maintain their said action. (4) Defendant, further answering, says that it entered upon and constructed its road along, over, and upon said street as claimed by plaintiffs, and built its station-house and established its depot for the city of Fort Smith at the intersection of Ozark street with Walnut street, and expended large sums of money laying its track, acquiring depot grounds, and erecting suitable depot buildings; that plaintiffs, and those under whom they derive their alleged title, had full knowledge of the aforesaid facts, and made no objection to the occupancy of said street by defendant as aforesaid, although they knew that the use and occupancy thereof was essential to enable the defendant to reach its depot with its trains and conduct its business. Wherefore the defendant alleges that plaintiffs are estopped from bringing their action in this cause." It is conceded in the pleadings that the appellants hold the freehold to the middle of the street, subject to the easement of the public to use and enjoy it as a street.

A street is a highway, nothing more, over which the people have a right of passage. The interest of the public in it does not comprehend any interest in the soil. The right of the free-

Lot-owner who has fee in street is entitled to compensation. hold is unaffected by establishing the highway. Its use by every citizen must be appropriate for the purpose for which it was intended,—that is, of transit, with such stoppage as business, necessity, accident, or the ordinary exigencies of travel may require.

The owner of the freehold may make any use of the soil not inconsistent with the public easement; and any use of it by another, which is not within the scope of the easement, is an infringement of his rights for which he may invoke the ordinary legal remedies. 2 Smith, Lead. Cas. 144, 167; *Goodtitle v. Alker*, 1 Burrows, 133; *Taylor v. Armstrong*, 24 Ark. 102. The appellee's occupancy and use of the street is an infringement of the reversed rights of the appellants therein, unless it is one of the modes of enjoying the easement in a street contemplated in its original dedication. Upon this question the authorities are divided. Judge Dillon, after a thorough and discriminating investigation and consideration of the authorities, concludes that "the weight of judicial authority at present undoubtedly is that where the public have only an easement in

streets, and the fee is retained by the adjacent owner, the legislature cannot, under the constitutional guaranty of private property, authorize a steam railroad to be constructed thereon against the will of the adjoining owner, without compensation to him. In other words, such a railway, as usually constructed and operated, is an additional servitude." 2 Dill. Mun. Corp. p. 717. The question was decided by the supreme court of Massachusetts, in the case of *Inhabitants of Springfield v. Connecticut R. R. Co.*, 4 Cush. (Mass.) 71, and Mr. Chief Justice Shaw, delivering the opinion of the court, said: "The two uses are almost, if not wholly, inconsistent with each other; so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated." The court of appeals in New York, in several cases, has announced the same conclusion. In the case of *Wager v. Troy Union R. Co.*, 25 N. Y. 533, the court say: "It is quite apparent that the use by the public of a highway, and the use thereof by a railroad company, is essentially different. In the one case every person is at liberty to travel over the highway in any place or part thereof, but he has no exclusive right of occupation of any part thereof, except while he is temporarily passing over it. It would be a trespass for him to occupy any part of the highway exclusively for any longer period of time than was necessary for that purpose and the stoppage incident thereto. But a railroad company takes exclusive and permanent possession of a portion of the street or highway. It lays down its rails upon, or imbeds them in, the soil, and thus appropriates a portion of the street to its exclusive use, and for its own particular mode of conveyance." The same court, discussing the question in the case of *Williams v. New York Cent. R. Co.*, 16 N. Y. 109, says: "The argument is that, as he has consented to the laying out of a highway upon his land, *ergo*, he has consented to the building of a railroad upon it; although one of these benefits his land, renders access to it easy, and enhances its price, while the other makes access to it both difficult and dangerous, and renders it comparatively valueless. . . . It is the public interest supposed to be involved which begets the difficulty, and it is just for this reason that the constitution interferes for the protection of individual rights, and provides that private property shall not be taken for public use without compensation." The operation of the cars endangers others in the use of the highway, and is always attended with annoyance and inconvenience to those occupying adjacent property. The rules above find emphatic indorsement from the supreme court of Wisconsin in the case of *Ford v. Chicago & N. W. R. Co.*, 14 Wis. 609. They are approved, either directly or indirectly, by the courts of last resort in a large number of the states, and we think are sustained

as well by reason as authority. *City of Denver v. Bayer*, 23 Amer. Law. Reg. 440, 2 Am. & Eng. Corp. Cas. 465; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439; *Imlay v. Union Branch R. Co.*, 26 Conn. 249; *Kucheman v. Chicago, C. & D. R. Co.*, 46 Iowa, 366; *Cooley, Const. Lim.* 549; *Taylor v. Chicago, M. & St. P. R. Co.*, 63 Wis. 327.

When the carriages and motors used in operating a railroad, and their danger to others using the same highway, the insecurity, inconvenience, and annoyance they occasion occupants of adjacent lots, and the injury to the use and value of the lots, are considered, the analogy between the use of the street for ordinary travel and its use for a railroad is entirely lost. Such being the case, the right of way of the appellee was carved out of the freehold of the appellants, and not out of the easement controlled by the city of Fort Smith. Under the constitution, the city of Fort Smith could not transfer it to the appellee. The

Municipal ordinance is no defence as against owners of fee of street. legislature could impart no validity to such an attempted transfer. The third paragraph in the answer did not allege facts constituting a ground of defence. The public interest in the street is under the control and supervision of the city, and the ordinance may furnish the appellee immunity from complaint or prosecution for interference with the easement. It can confer no rights as against the owner of the servient estate.

Although the appellee acquired no right of way under the city ordinance or act of the general assembly, it was authorized legally to appropriate it, upon making compensation to the owner. The state had invested it with its right of eminent domain, to be exercised at its will, upon compliance with that condition. It was not bound to consult the pleasure of the owner. His consent would not have been required, nor his dissent regarded, if compensation had first been made to the owner. This condition is imposed upon the right, for the benefit and protection of the owner. It is entirely for his good, and has no reference to any public interest or policy. Such being its object and purpose, compliance with it may be insisted upon or waived, at the pleasure of the owner. He may arrest the first step towards appropriation, until compensation is made, and to this end the law supplies abundant remedies, or he may permit the acts of appropriation to proceed until it is consummated. In that event it does not follow that he can invoke the same remedies. A text-writer of high standing says "that if a land-owner, knowing that a railway company has entered on his land, and is engaged in constructing its road without having complied with the statute, remains inactive, and permits them to go on and expend large sums in the work, he will be estopped from main-

Acquiescence in construction of railroad estops owner from maintaining objection.

taining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein." 2 Wood, Ry. Law, 792. This conclusion is reached from the principle announced by Lord Chancellor Cottenham in the case of *Duke of Leeds v. Earl of Amherst*, 2 Phil. Ch. 117, 123, that "if a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain." Judge Redfield quoted the lord chancellor with approval in a case involving the principle invoked in this, though on a different state of facts. He says: "In these great public works the shortest period of clear acquiescence, so as fairly to lead the company to infer that the party intends to waive his claim for present payment, will be held to conclude the right to assert the claim in any such form as to stop the company in the progress of their works, and especially to stop the running of the road after it has been put in operation, whereby the public acquire important interests in its continuance. The party does not, of course, lose his claim, or the right to enforce it, in all proper modes. He may possibly have some rights analogous to the vendor's lien in England." *McAulay v. Western & C. R. Co.*, 33 Vt. 321. His conclusion was that a waiver barred the action of ejectment. It is possible that the facts in that case did not call for the opinion delivered; but, be that as it may, the case was reviewed by the court years afterwards, when time and experience had given opportunity to test the correctness of the opinions expressed, and they were, in so far as here quoted, approved in stronger language. The court there say: "We therefore hold that where a railroad company has entered upon land, and constructed its road, without making compensation to the land-owner, and such entry and construction were by the latter's consent, that ejectment and trespass cannot be maintained; and the same rule should apply where the original entry was without the consent of the land-owner, in case he stands by, and, knowing of the entry and construction, makes no objection to it, and permits the road to be used for years. He should, under such circumstances, be held to have acquiesced therein. But the owner should not be deprived of compensation for his land." *Kittell v. Missisquoi R. Co.*, 56 Vt. 109, 20 Am. & Eng. R. Cas. 165. The supreme court of Indiana, in a late and well-considered opinion, announces the same rule. *Midland R. Co. v. Smith* (Ind.), 15 N. E. Rep. 256. The same views are expressed by the supreme court of Ohio, and in very much the same terms. They say: "Where a party stands by, as we must presume the plaintiff to have done in the present case, and silently sees a public railroad constructed upon his land, it is too late for him, after the road is completed, or large sums

have been expended on the faith of his apparent acquiescence, to seek, by injunction or otherwise, to deny to the railroad company the right to use the property. Considerations of public policy, as well as recognized principles of justice between parties, require that we should hold in such cases that the property of the owner cannot be reclaimed, and that there only remains to him a right of compensation. . . . The work being completed, the public, as well as those directly interested in the road as stockholders and creditors have a right to insist on the application of the rule that he who will not speak when he should will not be allowed to speak when he would." *Goodin v. Cincinnati W. Canal Co.*, 18 Ohio St. 169. The general doctrine is sufficiently indicated in the cases cited, and is abundantly sustained in many others. *U. S. v. Great Falls Mfg. Co.*, 112 U. S. 645, 656; *Harlow v. Marquette, H. & O. R. Co.*, 41 Mich. 336; *Pryzbylowicz v. Missouri R. R. Co.*, 17 Fed. Rep. 492; *Lawrence v. Morgan's La. & T. R. & S. Co.*, 30 Am. & Eng. R. Cas. 309; *St. Julien v. Morgan's La. & T. R. Co.*, 35 La. An. 924, 33 Am. & Eng. R. Cas. 92; *New Orleans & S. R. Co. v. Jones*, 68 Ala. 48; *Pettibone v. La Crosse & M. R. Co.*, 14 Wis. 443; *Nicholson v. New York & N. H. R. Co.*, 22 Conn. 74.

By authority, and upon principle, it would seem that original consent of the owner, and his subsequent unreasonable acquiescence, should be viewed alike. In the case of *Cairo etc., R. Co. v. Turner*, 31 Ark. 494-510, this court said: "If the appellee was not confined to the statute remedy, as it seems from the authorities he was, he should in justice be required to resort to some remedy that would give him the value of his land, and leave the company in the use of the easement." The facts in that case did not call for this expression of opinion, but it indicates that the mind of the court looked with approval upon the line of authorities we have here referred to. The matter is incidentally discussed by this court in the case of *Organ v. Memphis & L. R. Co.*, involving kindred questions. In that case the court granted the relief sought, for the reason, as stated, that it could not be said that the party seeking it had stood by and acquiesced in the acts of appropriation. In that opinion the views of this court are to some extent indicated as to the rights and remedies of the owner against a company occupying his lands. There are some courts of high learning that differ from the views quoted; but, after a careful examination of the cases cited in the brief of appellants and many others upon the subject, we think they are against the current of authority, and not sustained by reason. The complaint was filed September 10, 1886. The city ordinance was passed January 2, 1883, and during that entire time the record discloses no objection on the part of the appellants to the use and occupation of the street

by the railroad. We think they must be held to have acquiesced in this use and occupation. The fourth paragraph of the answer contains a sufficient defence to the complaint.

The appellee urges that no action of ejectment will lie for the burden imposed on the fee by the railroad, and cites in support two decisions of this court,—*Little Rock & F. S. R. Co. v. McGehee*, 41 Ark. 202, 20 Am. & Eng. R. Cas. 82, and *Bentonville R. Co. v. Baker*, 45 Ark. 252. The question was not involved, referred to, or discussed in either of the cases cited. That ejectment is a proper remedy seems to be borne out by the authorities elewhere, and it is defeated in this cause by the voluntary conduct of the appellants. *Weisbrod v. Chicago & N. W. R. Co.*, 21 Wis. 609; *Wager v. Troy Union R. Co.*, 25 N. Y. 534; *Smith v. Chicago, A. & St. L. R. Co.*, 67 Ill. 191; *Sharpe v. St. Louis & S. E. R. Co.*, 49 Ind. 296; 2 Dill. Mun. Corp. § 662. As the fourth paragraph in the answer set up a good defence, the judgment is affirmed.

Ejectment by Land-owner to Recover Lands Wrongfully Occupied.—Where a railroad enters upon land without condemning it to its use, the proprietor may maintain ejectment to recover possession. *Jones v. New Orleans & S. R. Co. (Ala.)*, 14 Am. & Eng. R. Cas. 217; *New Orleans & S. R. Co. v. Jones (Ala.)*, 2 Ib. 425; *Smith v. Chicago, A. & St. L. R. Co.*, 67 Ill. 191; *Graham v. Columbus & I. C. R. Co.*, 27 Ind. 260; *Carpenter v. Oswego & S. R. Co.*, 24 N. Y. 655; *International & G. N. R. Co. v. Benitos (Tex.)*, 10 Am. & Eng. R. Cas. 122; *Snell v. Wasatch & J. V. R. Co. (Utah)*, 14 Ib. 475. So, too, ejectment may be maintained when the condemnation proceedings are void for want of jurisdiction or any other cause. *Memphis, K. & C. R. Co. v. Parsons Town Co.*, 26 Kan. 503; *Kanne v. Minneapolis & St. L. R. Co.*, 33 Minn. 419; *Hull v. Chicago, B. & O. R. Co.*, 21 Neb. 371; *Adams v. Saratoga & W. R. Co.*, 10 N. Y. 328; *Bothe v. Dayton & M. R. Co.*, 37 Ohio St. 147.

Where payment of the compensation has not been made before entering upon the land, ejectment will lie. *Cummins v. Des Moines & St. L. R. Co. (Iowa)*, 17 Am. & Eng. R. Cas. 86; *Conger v. Burlington & S. W. R. Co.*, 41 Iowa, 419; *St. Joseph & D. C. R. Co. v. Callender*, 13 Kan. 496; *Dater v. Troy T. & R. Co.*, 2 Hill (N. Y.), 629; *Pittsburgh & L. E. R. Co. v. Bruce (Pa.)*, 10 Am. & Eng. R. Cas. 1; *Gilman v. Sheboygan & F. L. R. Co.*, 40 Wis. 653; *White v. Wabash, St. L. & P. R. Co.*, 64 Iowa, 281; *Kanne v. Minneapolis & St. L. R. Co.*, 30 Minn. 423; *Chicago, St. L. & W. R. Co. v. Gates*, 120 Ill. 88; *Daniels v. Chicago & N. W. R. Co.*, 35 Iowa, 129. But when the constitution of the state does not require prepayment of the compensation as a condition precedent to the exercise of the power of eminent domain, and the statute contains no provision for prepayment, the land-owner cannot maintain ejectment because of nonpayment of the damages. *Cairo & F. R. Co. v. Turner*, 31 Ark. 494.

Where the receiver of an insolvent railroad corporation unlawfully appropriates land to the use of the company, and, after the discharge of the receiver, the company resumes control of the railroad and retains possession of and uses the land, the owner can maintain an action to recover possession, and his right of action is not affected by a notice of the receiver requiring the presentation of claims. *Bloomfield R. Co. v. Van Slike*, 107 Ind. 480.

Where the action is brought upon the ground that the damages assessed have never been paid, although the action will lie, execution will be stayed for a reasonable time to allow the payment of the damages. *Conger v. Burlington & S. W. R. Co.*, 41 Iowa, 419. And in Pennsylvania, where it is held that the knowledge of the proprietor that the railroad company was constructing its track, will not estop him from maintaining ejectment, the court will, on payment of costs, stay execution for a time sufficient to permit of the condemnation of the land. *Allegheny V. R. Co. v. Colwell* (Pa.), 15 Atl. Rep. 927.

Ejectment may be maintained when the company has located its track or depot on land other than that which it acquired title to under agreement with the plaintiff. *Robinson v. Pittsburgh R. Co.*, 57 Cal. 417.

The purchaser at a judicial sale who acquires a title unburdened by any right of way may maintain ejectment against a railroad company that had wrongfully constructed its track over the land before the time when he acquired title. *Chicago & I. R. Co. v. Hopkins*, 90 Ill. 316.

When, by agreement with the company, the owner agrees to give a right of way subject to the performance of certain stipulations, and retains the legal title in his own name, he may maintain ejectment in the event of a breach of the conditions. *Hoopar v. Columbus & W. R. Co.* (Ala.), 29 Am. & Eng. R. Cas. 540.

Same—Notice to Quit.—But if the company has entered upon the lands with the owner's assent, though without instituting the proper condemnation proceedings, ejectment will only lie after notice to the company to quit. *Smith v. Chicago, A. & St. L. R. Co.*, 67 Ill. 191. In *Chicago, B. & Q. R. Co. v. President, etc., of Knox College*, 34 Ill. 195, it appeared that the company had entered upon land in 1854 for its right of way, had the damages resulting therefrom duly assessed, and with the consent of the owner constructed and operated its road on the land. The owner of the land brought an action against the company for the assessed compensation, and recovered judgment therefor, which was never satisfied. In 1859 he brought an action for ejectment against the lessee of the company by whom the road was being operated. *Held*, that the lessee having succeeded to the rights of the lessor, and the lessor's entry having been lawful, the action could not be maintained without notice to quit.

Same—Occupation of Street without Compensation.—When an abutting lot-owner owns the fee of the street to the centre line, he can maintain ejectment against a railroad company which has constructed its road therein without condemning the right of way and making compensation. *Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178; *Terre Haute & S. E. R. Co. v. Rodell* (Ind.), 10 Am. & Eng. R. Cas. 284. See also *Weisbrod v. Chicago & N. W. R. Co.*, 21 Wis. 602; *Weyl v. Sonoma Valley R. Co.*, 69 Cal. 202. But it has been held that when the use of the street or highway has been authorized by the municipal authorities, an abutting proprietor cannot bring ejectment. *Edwardsville R. Co. v. Sawyer*, 92 Ill. 377. In *Carpenter v. Oswego & S. R. Co.*, 24 N. Y. 655, it was held that, where the proceedings for the establishment of a street had proved to be defective, ejectment would lie, at the suit of the owner of the land, against a railroad company which had constructed its road thereon with the permission of the city authorities.

Where a railroad company constructs its railway through the streets of a city, and uses the same in the ordinary way, without any claim of title to or interest in the street beyond the actual enjoyment thereof for the purpose mentioned, the public using and enjoying the street as such without disturbance, the premises cannot be said to be "occupied" by the company within the provision of a statute requiring ejectment to be brought against the "actual occupant." Nor in such a case will the action lie in

favor of one claiming to be the owner of the soil and freehold of the street subject to the public easement therein as a street, to recover possession of the railroad company on the ground of its "exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein." *Redfield v. Utica & S. R. Co.*, 25 Barb. (N. Y.) 54.

Same—Damages for Trespass.—In an action to recover possession of land taken for right of way, damages for the trespass may be recovered. *Birge v. Chicago, M. & St. P. R. Co.* (Iowa), 20 Am. & Eng. R. Cas. 291.

Same—Effect of Acquiescence in Construction of Road.—The owner of land, who stands by without objection and sees a railroad constructed over it, cannot, after the road is completed, or large expenditures have been made thereon upon the faith of his apparent acquiescence, maintain ejectment against the company on the ground that he has never been compensated. He, however, does not thereby lose his right to recover compensation by the usual statutory proceedings or by action at law. *Louisville, N. A. & C. R. Co. v. Soltwedde* (Ind.), 36 Am. & Eng. R. Cas. 577; *Bravard v. Cincinnati, H. & I. R. Co.*, 115 Ind. 1; *Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 308; *St. Julien v. Morgan's L. & T. R. Co.*, 35 La. An. 924; *Kanaga v. St. Louis, L. & W. R. Co.*, 76 Mo. 207; *Paterson, N. & N. Y. R. Co. v. Kamlah*, 42 N. J. Eq. 93; *Goodin v. Cincinnati & W. Canal Co.*, 18 Ohio St. 169; *Tompkins v. Augusta & K. R. Co.*, 21 S. Car. 420; *Knapp v. McAuley*, 39 Vt. 275; *McAuley v. Western Vt. R. Co.*, 33 Vt. 311; *Taylor v. Chicago, M. & St. P. R. Co.* (Wis.), 22 Am. & Eng. R. Cas. 123; *Prybylowicz v. Missouri River R. Co.*, 17 Fed. Rep. 492.

Where the plaintiff, with full knowledge of the circumstances, allows a railroad company to proceed with the construction of the road, makes no objection, and takes part in the condemnation proceedings with a view to obtaining an increase of the compensation, he cannot thereafter maintain ejectment to recover possession of the land. *Gray v. St. Louis & S. F. R. Co.* (Mo.), 22 Am. & Eng. R. Cas. 106; *Provolt v. Chicago, R. I. & P. R. Co.*, 57 Mo. 256; *St. Louis, A. & T. H. R. Co. v. Karnes* (Ill.), 10 Am. & Eng. R. Cas. 39. But in Iowa it has been held that the mere fact that the owner of land stood by and permitted a railway company to enter upon it and construct its road does not estop him from maintaining an action of ejectment against it. *Conger v. Burlington & S. W. R. Co.*, 41 Iowa, 419.

And it would appear that acquiescence in the occupation of the land by the railroad company will not be inferred when the owner had no knowledge of the trespass until long after it had been committed. *Bothe v. Dayton & M. R. Co.*, 37 Ohio St. 147.

But where it appeared that plaintiff was a promoter of the company, and owned about one fifth of the stock; that he permitted the company to lay its track across his lands without making any claim for compensation or attempting to have the damages assessed; and that he took an active part in issuing and disposing of mortgage bonds to satisfy which the road was sold,—it was held that plaintiff was estopped from bringing ejectment. *Omaha & N. W. R. Co. v. Redick* (Neb.), 17 Am. & Eng. R. Cas. 107.

Where the owner obtains a reversal of the condemnation proceedings and commences an action to recover possession of the land, the mere fact of delay, without proof of knowledge or acquiescence in the acts of the company, will not estop him from maintaining the action. *Bothe v. Dayton & M. R. Co.*, 37 Ohio St. 147.

Construction of Railroad in Street—Injunction.—An abutting lot-owner, on a street along which the defendant company was about to construct a railway track under the authority of a municipal ordinance, filed a bill to enjoin the company, from proceeding with the construction, on the ground that his property would be damaged, and that compensation had not been

made by the company as required by art. 2, § 21, of the Missouri Constitution. No application for a temporary injunction was made, and in the mean time the track was laid and put in operation. *Held*, on final hearing, that plaintiff was not entitled to an injunction and must be left to obtain his remedy by an action for damages. *D. M. Osborne & Co. v. Missouri Pac. R. Co.*, 37 Fed. Rep. 830.

THEOBOLD

v.

LOUISVILLE, NEW ORLEANS AND TEXAS R. CO.

(*Mississippi Supreme Court, April 15, 1889.*)

Street—Construction of Railroad—Compensation to Abutting Lot-owners—Title to Fee.—A railroad is not one of the legitimate uses of a public street, and the owner of property abutting upon a street in which a steam railroad has been constructed is entitled to compensation whether he owns the fee of the street or not.

APPEAL from Circuit Court, Warren County.

Action against the Louisville, New Orleans & Texas R. Co. to recover damages for injuries to property belonging to plaintiff caused by the construction of defendant's railroad upon a public street in the city of Hicksville. A demurrer to the complaint having been sustained, the plaintiff appealed.

Murray F. Smith for appellee.

Dabney McCabe & Anderson and *John N. Bush* for appellant.

ARNOLD, C.J.—Whether the abutting owner of land on a public street has such interest in the street as to require condemnation, or his consent, before the street can be lawfully used by a railroad company for constructing its track and operating its trains on the street, and to enable him to recover compensation for injuries sustained on account of the street being used for such purpose, is an open question in this state. There was some consideration of the subject in *Donnaher v. State*, 8 Smedes & M. 649, and in *New Orleans, J. & G. N. R. Co. v. Moye*, 39 Miss. 374, but the question was not decided in either case. In a few states, notably in Pennsylvania, such right in the adjoining owner is denied; but generally there is a juster

Right of abutting lot-owner to compensation undecided in Mississippi.

appreciation and better definition of private rights and interests in regard to the matter.

It is obvious that the right of the adjacent owner to the free use of the street on which his property is located imparts value to the property, and that to deny or restrict his use of the street, by unusual, dangerous, and permanent obstructions and appliances placed in the street, would seriously affect the value and enjoyment of his property. While the general public might be benefited by the existence of such obstructions and appliances, the adjoining owner might be greatly damaged, if not ruined, by them, if the law afforded him no remedy. Of such disadvantages, if any, as may result from the use of the street by the public in the manner in which public streets are ordinarily used, he could not complain: but it seems clear that the construction and operation of a railroad in the street in front of his property, without his consent, and without his being compensated, would be an invasion of his legal rights. This conclusion follows inevitably, unless railroads are among the objects for which public streets are originally designed. Can railroads be said to be among such objects?

A street is a public thoroughfare or highway, established for the accommodation of the public generally, in passing from place to place, and for such other incidental uses as are ordinarily made of public streets,—such as laying drains, sewers, gas and water pipes, and the like. Public streets are for the use and benefit of all, and no one has any exclusive rights and privileges therein. They are free to all upon like conditions, and subject to use by any means of locomotion which is not destructive of the common uses and ordinary methods of travel. If this is true, a railroad does not fall within the purposes for which public streets were originally established, and the occupation of a public street by a railroad is an additional servitude on the land, and a perversion of the street from its original purposes. The introduction of a new motive power, would not, perhaps, be material; but a railroad requires a permanent structure in the street, the use of which is private and exclusive. It confers upon an individual or corporation rights and privileges in the street which are incompatible with those of the public and of adjacent proprietors. To hold that a railroad is one of the legitimate uses of a public street leads to the inconsistency that the street may be monopolized by a corporation or an individual, and filled with parallel tracks which would practically exclude all ordinary travel, and still be said to be devoted to the ordinary uses of a public street. Lewis, Em. Dom. § 111; 1 Hare, Const. Law, 362; Cooley, Const. Lim. 678.

Railroad is not within purpose for which street was originally established.

"When the owner of a tract of land lays the same out into lots and streets, and sells the lots, the purchasers of such lots acquire, as appurtenant thereto, a private right of way and access over the streets. This private right arises without any express grant, and in the absence of any statute. The law presumes that the parties had in mind the advantages to be derived from the use of the proposed streets, and implies a right to such use as a part of the grant. . . . If several persons, owners of distinct parts of a tract, should join in laying the same out into lots and streets, the result would be the same. The law would imply the grant of mutual easements of way and access, appurtenant to the respective lots, . . . in the absence of any statute or express mention of such easements. These private rights or easements are the presumed, as well as the real, consideration for the grant or dedication of a part of the tract to public use. . . . If, instead of making a gift of the streets to the public, the proprietors should voluntarily grant the streets for a consideration agreed upon and paid by the public, it would still be true in fact, and therefore presumed by law, that in fixing the consideration to be paid the parties had in mind the advantages to be derived from the use of the street; that is, the consideration to each proprietor would be the right to make use of the streets in connection with his lots, and a certain sum of money paid." Lewis, Em. Dom. § 114. If the streets are established by the exercise of the right of eminent domain, the effect, in principle, should not be different. *Ib.*

The laying out of a public street creates two co-existent rights,—one belonging to the public, to use and improve the street for the ordinary purposes of a street; the other, to the abutting owner, to have access to and from his property over the street, and to make such use of the street as is customary and reasonable. Both are valuable, and the one as inviolable as the other. It would be as unjust and unwarranted for the public to use and appropriate the street, so as to impair or destroy the rights of the abutting owner, without his consent, and without compensation, as it would be for him, by a like course of conduct, to impair or destroy the rights of the public. So that it appears that the abutting owner has special interests and rights in a public street, which are valuable and indispensable to the proper and beneficial enjoyment of his property. His right to use the street as a street is as much property as the street itself, and neither the public, nor a corporation, nor an individual, can lawfully deprive him of it, against his will, without compensation. If the street is needed for the purpose of a railroad, or

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streets.**

for any other purpose inconsistent with the ordinary uses of a public street, the rights and interests of the abutting owner must be obtained, with his consent, or by the exercise of the right of eminent domain, as in other cases of taking private property for public use. *Haynes v. Thomas*, 7 Ind. 38; *Tate v. Ohio & M. R. Co.*, Ib. 479; *Crawford v. Village of Delaware*, 7 Ohio St. 459; *Burlington & M. R. Co. v. Reinhackle*, 15 Neb. 279, 14 Am. and Eng. R. Cas. 169; *Lahr v. Metropolitan Elevated R. Co.*, 104 N. Y. 268. If the rights of the abutting owner may be taken from him without his consent, and without compensation, "a system has been inaugurated," says the court of appeals of New York, "which resembles more nearly legalized robbery than any other form of acquiring property." Ib.

The weight of judicial authority undoubtedly is that where the public have only an easement in the street, and the fee of the soil of the street is retained in the abutting owner, under the constitutional guaranty of private property, a steam railroad cannot be lawfully constructed and operated thereon, against his will, and without compensation. *Lewis*, Em. Dom. §§ 113, 115; 1 *Hare*, Const. Law, 362; *Mills*, Em. Dom. (2d ed.) § 204; 2 *Dill*, Mun. Corp. (3d ed.) § 725. Compensation may be recovered for construction of railroad whether lot-owner has title to fee or not.

A distinction is made by some of the authorities, in cases where the fee in the soil of the street is in the public, the state, county, or city, and where it remains in the abutting owner; and in the first case the right of the abutting owner to compensation is denied, and in the latter it is recognized and allowed. We perceive no well-founded difference in principle in such distinction. If the fee is in the public, it is held in trust, expressly or impliedly, that the land shall be used as a street, and it cannot be applied to any other purpose without a breach of trust. It is only where the fee is in the public, free from any trust or duty, that it may be disposed of for any purpose that the public may deem proper. Whether the abutting owner has simply an easement in the street, while the fee is in the public or in some other owner, or whether he has both the fee and an easement, he is equally entitled to require that nothing shall be done in derogation of his rights. 1 *Hare*, Const. Law, 370, 375; *Lewis*, Em. Dom. §§ 114, 115; *Barney v. Keokuk*, 94 U. S. 324; *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. (U. S.) 272; *Story v. N. Y. Elevated R. Co.*, 90 N. Y. 123; 1 *Ror. R. R.* 524, 7 Am. & Eng. R. Cas. 596; *Haynes v. Thomas*, 7 Ind. 38; *Anderson v. Turbeville*, 6 Cold. Tenn. 150; *Railroad Co. v. Steiner*, 44 Ga. 546; *Crawford v. Village of Delaware*, 7 Ohio St. 459.

It is apparent that there is a difference between the ordinary horse railway and the ordinary steam railway, with reference to

their use of a public street ; but whether the difference is only one of degree we are not called upon to decide in this case.

Judgment reversed, demurrer overruled, and cause remanded.

Construction of Railroad in Street—When Abutting Lot-owner is Entitled to Compensation.—See *Iron Mountain R. Co. v. Bingham* (Tenn.), *ante*, p. 444, and note, p. 452.

PENNSYLVANIA SCHUYLKILL VALLEY R. CO.

v.

WALSH *et al.*

(*Pennsylvania Supreme Court, March 18, 1889.*)

Street—Construction of Railroad—Compensation of Property-owners—Injury to Access.—If a railroad track is laid so close to the curb-stone on the side of the street next to the plaintiff's property that the access thereto, if not actually cut off, is rendered dangerous, plaintiff's property is "injured" by the construction of the railroad within the meaning of the provision in the Pennsylvania constitution, and not merely by the use and operation of the road ; and the plaintiff is entitled to compensation for the injury resulting therefrom.

ERROR to Court of Common Pleas, Montgomery County.

Action by Maurice A. Walsh and others, executors, against the Pennsylvania Schuylkill Valley R. Co. to recover compensation for injuries to property belonging to plaintiffs situated in the borough of Norristown. A verdict having been returned for the plaintiffs and a motion for a new trial overruled, the defendants sued out a writ of error.

C. H. Stinson for plaintiff in error.

John G. Johnson and *Charles Hunsicker* for defendants in error.

PAXSON, C.J.—While there are numerous assignments of error in this case, the fifth presents the only question which requires discussion. The defendant below asked the court to instruct the jury that "there can be no compensation for injury to persons or property unaccompanied with negligence arising from the operation or use of the defendant's railroad, constructed on a public street in the borough of Norristown, and so authorized by law, when no land is taken from the plaintiff, nor the grade of the street changed by excavation or

embankments by the defendant in front of the plaintiff's premises, as distinguished from its construction; and if the jury does not find negligence on the part of the defendant causing such injury, the plaintiff is not entitled to a verdict;" which point the court below answered as follows: "Refused. It is true that the ordinary and proper use of a railroad cannot be regarded as an element of damages unless the construction of the railroad interferes with the property of the plaintiffs; but we cannot say that if the jury find that this railroad is not negligently operated, they must find a verdict against the plaintiff." The plaintiffs below are the owners of a certain property situated in the borough of Norristown, having a front of about 196 feet on Lafayette street. Upon this property there is a church building about 30 feet back from said street, in the rear-basement of which is a school-room; a parsonage about 40 feet back from said street; and three tenement-houses on the line of said street. The defendant company has constructed its railroad upon Lafayette street, and has laid its tracks close to the curb-stone in front of said church, parsonage, and tenement-houses, and has since continuously and constantly run locomotives and trains of passenger and freight cars over said tracks. This action was brought in the court below for damages arising from the erection and construction of the defendant's road; the allegations being that said street or highway is "obstructed, closed, and destroyed, and all access to the front of said messuage and tenement, parsonage, church edifice, and school is prevented, cut off, and taken away, and the same rendered difficult and dangerous of approach, and the said parsonage, church edifice, and school remained unfit and unsafe for use as a parsonage, church, and school, and their value was wholly and totally destroyed."

We have recently discussed so fully the question of consequential injuries resulting from the erection and construction of railroads that a further elaboration of the subject is deemed unnecessary. Our latest case is *Penn. R. Co. v. Marchant*, 119 Pa. St. 541, 33 Am. & Eng. R. Cas. 116, in which it was held that the word "injury," (or "injured") as used in section 8, art. 16, of the constitution, means such a legal wrong as would be the subject of an action for damages at common law; that for such injuries both corporations and individuals now stand upon the same plane of responsibility. In that case, as in the prior case of *Penn. R. Co. v. Lippincott*, 116 Pa. St. 472, 30 Am. & Eng. R. Cas. 399, there was no injury to the property by reason of the erection and construction of the road, and we held that the constitutional provision was not intended to apply to injuries which were the result merely of the operation of the road, as distinguished from its construction; and that in such case there could be no recovery

Right to damages for consequential injuries.

for the annoyance of smoke, noise, and cinders, etc., caused by the running of the company's trains, unaccompanied with negligence. In other words, that the injuries resulting from the exercise of a lawful business, in a lawful manner, without negligence and without malice, are *damnum absque injuria*.

We cannot, however, apply that rule to this case for obvious reasons. In *Penn. R. Co. v. Lippincott*, and *Penn. R. Co. v.*

Damages may
be recovered
when track in-
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Marchant, *supra*, as in this case, there was no actual taking of any portion of the plaintiff's property. But there the analogy ceases. In the cases cited there was no injury by reason of the construction of the road; here there was an injury, and a serious one, the direct result of the construction. The track was laid close to the curb-stone on the side of the street next to the plaintiffs' property, by means of which the access thereto, if not actually cut off, was rendered dangerous. In this respect the case is upon all fours with *Penn. R. Co. v. Duncan*, 111 Pa. St. 352, 29 Am. & Eng. R. Cas. 354, and *County of Chester v. Brower*, 117 Pa. St. 647. It was urged, however, that the mere laying down of the tracks in front of the plaintiff's property was not, of itself, an injury; that it was a benefit, in view of the fact that the street had been greatly improved by having been repaved with Belgian blocks in a superior manner; and that the injury was solely the result of the use and operation of the road. This is plausible, but unsound. Where the question is the obstruction of access to a property by the building of a railroad, it is impossible to separate the construction from the operation of the road. Such a doctrine would be a misapplication of the rule laid down in *Penn. R. Co. v. Marchant*, *supra*. It would be an unsavory technicality to hold that a railroad laid down by the curb in front of a man's door, with trains constantly passing and repassing, did not interfere with his access to his house, and was not an injury caused by the construction of the road. No authority for such a proposition can be found in anything this court has ever said. We are of opinion that in the case in hand there was an injury arising from the erection and construction. This being so, it stands upon the same footing as to consequential injuries as if there had been an actual taking of a portion of the plaintiffs' property.

Judgment affirmed.

Construction of Railroad in Street—When Abutting Lot-owner is Entitled to Compensation.—See *Iron Mountain R. Co. v. Bingham* (Tenn.), *ante*, p. 444, note, p. 452; *Theobald v. Louisville, N. O. & T. B. Co.* (Miss.), *ante*, p. 462.

Street—Construction of Railroad—Compensation to Abutting Lot-owner.—In Kentucky, whether an abutting lot-owner owns the fee of the street subject to the public use or not, he cannot recover damages for the con-

struction of a railroad which result from the mere inconvenience arising from the use of the street by the railroad company. It is only when the use of the street by the railroad company interferes with the reasonable use of it in the usual mode and affects the owner's right of access that he is entitled to compensation. Even if he has suffered injury from an interference with his right to use the street, an injunction against the railroad company will only be granted when the evidence clearly shows the existence of the right and its invasion, and that such a remedy is necessary to adequate relief. *Hyland v. Short Route Ry. Transf. Co.*, Ky. Ct. App., March 9, 1889; citing *Cosby v. Owensboro & R. R. Co.*, 10 Bush (Ky.), 288; *Bulton v. Short Route Ry. Transf. Co.* (Ky.), 32 Am. & Eng. R. Cas. 256; *Lexington & O. R. Co. v. Applegate*, 8 Dana (Ky.), 289.

Same—Obstruction of Egress and Ingress Necessary.—In Kansas, where a person owns lots abutting on a city street along which a railroad company has constructed and is operating its line by authority of the city council, there must, to warrant a recovery of damages, be such a practical obstruction of the street in front of the lots that the owner is denied ingress and egress to and from them. *Kansas, N. & D. R. Co. v. Cuykendall*, Kan. Sup. Ct., July 5, 1889. The court said: "The question involved in this case has been the subject of much consideration in this court, and three opinions have been rendered that mark with some degree of reasonable certainty the line between the liability and non-liability of railroad companies whose lines are constructed along public streets to abutting owners for damages. These cases are *Atchison & N. R. Co. v. Garside*, 10 Kan. 552; *Central Branch U. P. R. Co. v. Andrews*, 30 Kan. 590, 14 Am. & Eng. R. Cas. 248; *Ottawa, O. S. & C. G. R. Co. v. Larson*, 40 Kan. 301. The rule to be deduced from these cases, and from what has been said by the court in the cases of *Central Branch U. P. R. Co. v. Twine*, 23 Kan. 585; *Kansas City & O. R. Co. v. Hicks*, 30 Kan. 288, 14 Am. & Eng. R. Cas. 100; and *Heller v. Atchison, T. & S. F. R. Co.*, 28 Kan. 625, 7 Am. & Eng. R. Cas. 636,—is that, in order to justify a recovery for damages by the abutting lot-owner, there must be such a practical obstruction of the street in front of the lots that the owner is denied ingress and egress to and from them. While the title to the streets is in the county, the legislature has given to the city government the power of full control. The abutting lot-owner has no greater right to the use of the public street than a railroad company that has been authorized to construct its line along it. Each must respect the use of the other, but nothing short of a practical obstruction of the use by one will be a cause of action to the other. A railroad is not an unreasonable obstruction to the free use of a street, but rather a new and improved method of using the same, and germane to its principal object as a passage-way, like the electric, steam-motor, and horse-car lines. *Mills*, Em. Dom. § 199; *Briggs v. Lewiston & A. H. R. Co.*, 79 Me. 363, 32 Am. & Eng. R. Cas. 167; *Slatten v. Des Moines V. R. Co.*, 29 Iowa, 149. So that, if the location and construction of the line of railroad is authorized by the city council, and its location in the street is such as to give the lot-owner ingress and egress to and from his lots, such use of the street by the railroad company does not interfere with the use of the lot-owner, and consequently he cannot recover for those remote and indirect inconveniences "arising from smoke, noise, offensive vapors, sparks, fires, shaking of the ground," and other annoyances. *Garside Case*, 10 Kan. 552. But where the location of the track is such that space enough is left in the street in front of the lots of the abutting owner so that he can pass between the sidewalk and track, and the railroad is operated in a legal and proper manner, the lot-owner cannot recover, because the space within which he has heretofore passed from and to his lots is restricted. There are cases in which a different rule would be ap-

plied, as where the city council has not authorized the use of the street by the railroad company, or where the railroad is operated in an illegal and wrongful manner, or where the railroad company has practically obstructed the whole street so that no one can pass and repass; but the facts in this case call for the application of the rule as laid down above. The jury specially find that there is a part of the street immediately in front of the lots owned and occupied by the defendant in error, and outside of the sidewalk, 15 feet in width, between the sidewalk and the side of the railroad, that is open for use, and this gives him reasonable ingress and egress."

Same—What Obstruction of Egress and Ingress gives Right to Damages.—Where a railroad company has constructed a switch, or "Y," in a public street of a city of the second class, without authority from the city council, so close to the sidewalk that it practically prevents access from the abutting lots to the street, the owner of the abutting lots so obstructed, can recover damages. *Kansas, N. & D. R. Co. v. McAfee*, Kan. Sup. Ct. July 5, 1889.

Same—Injury Must be Special.—In Kansas, an abutting lot-owner can only recover from a railroad company which has constructed its track in the street in front of his premises for such injury as is special to him and is not such as affects the public in general. *Central Branch Union Pac. R. Co. v. Andrews*, Kan. Sup. Ct., April 5, 1889.

Same—Lot-owner cannot Change Track or Repair Street to Lessen Injury.—The owner of property abutting on an alley so obstructed is not required or authorized upon his own motion to enter upon the alley, over which a railroad track is improperly constructed, for the purpose of changing the track, or repairing the alley, and thus lessen the injury and reduce the damages to which he was entitled by reason of such obstruction. The control of the alley is in the city. *Central Branch Union Pac. R. Co. v. Andrews*, Kan. Sup. Ct., April 5, 1889.

Same—When Action Accrues—Heirs and Administrators.—Where a railroad company sets stakes for the construction of its road in a public highway, and the owner of an abutting lot dies before any further steps are taken, an action for consequential damages is properly brought in the name of the widow and heirs of the deceased proprietor, and not in the name of the personal representatives, the mere setting of the construction stakes not being an injury to the property. *Pennsylvania Schuylkill Valley R. Co. v. Ziemer*, Pa. Sup. Ct., March 18, 1889.

SMITH

v.

EAST END STREET R. CO.

(*Tennessee Supreme Court, May 7, 1889.*)

Street Railway—Construction of Road—Consent of Property-owners.—A street railway company incorporated under the Tennessee statute—which provides that it "is authorized to consummate any contract with the city authorities . . . or with the county court . . . or with private individuals necessary to get the right of way along the public streets of the city, or along the public roads of the county, provided that no one of the streets of said city shall be used by said company . . . until the consent of the

city authorities has been first obtained and an ordinance shall have been passed, prescribing the terms on which the same may be done; or if the said road extends into the country, the consent of the county court must be first obtained"—does not require, in every case, to obtain the consent of the abutting lot-owners to the construction of its road, but only when it is deemed necessary to pass over property exclusively owned by private individuals.

Same—Compensation to Abutting Lot-owner—Instruction.—In an action by an abutting lot-owner who does not own the fee of the street to recover damages for injuries arising from the construction of a street railway, an instruction that the plaintiff, as an abutting lot-owner, is entitled to the free and unobstructed use of the street for purposes of ingress and egress to and from his lot, and that the impairment of the use for such purposes could be an element of damage, is as favorable to the plaintiff as he is entitled to.

Same—Construction of Road—Contract with City—Instruction—Harmless Error.—It is error in an action against a street railway company to recover damages for injuries to property abutting upon the street to instruct the jury that the defendant would not be liable for damages resulting from the construction of its road along the street if the work was done in compliance with the terms of a contract with the city; but where it appears that such contract is manifestly a lawful one, the error is harmless, and is not a sufficient ground for a reversal.

APPEAL from Circuit Court, Shelby County.

John D. Martin for appellant.

Myers & Sneed and Turley & Wright for appellee.

CALDWELL, J.—This action was commenced in the circuit court of Shelby county by Tillie M. Smith, an abutting lot-owner, to recover damages from the East End Street R. Co. for the alleged unauthorized construction and unlawful operation of a street-railway line upon and along Monroe street, in the city of Memphis. Verdict and judgment being adverse to the claim of plaintiff, she appealed in error to this court, and has here assigned numerous alleged errors in the action of the trial judge, on account of which she seeks a reversal and new trial. The defendant company laid out and constructed its railway under a "contract with the city authorities," but without any contract or agreement with the owners of lots abutting on the street. The plaintiff did not give her consent, and she claims that the use and occupation of the street by the defendant without her permission is a violation of her rights as an abutting lot-owner, and therefore illegal. Her contention is that the defendant's charter expressly required it to obtain the consent of abutting lot-owners, as well as that of the city authorities, before it could lawfully construct and operate its road in a public street. Her counsel submitted this construction of the charter in appropriate written instructions, and requested the trial judge to give it to the jury as a part of his charge. This his honor declined to do, and, instead of charging

Case stated.

as requested, told the jury that, having obtained the consent of the city by its contract, the defendant had the right to construct and operate its road upon the street without the consent of the plaintiff or of other persons owning property on the side of the street. This action of the court is assigned as error, and upon that assignment the charter comes up for construction.

The defendant was incorporated under the thirteenth section of chapter 142 of the acts of 1875, which section was subdivided by the compilers, and carried into the code (Mill. & V.) at sections 1920 to 1925, inclusive. By operation of law

Statute does
not require
consent of prop-
erty owners.

and in fact all the provisions of that section are embodied in and made part of the defendant's charter. So much of it as bears upon the question now under consideration is as follows: ". . . The said company is authorized to consummate any contract with the city authorities of the town aforesaid, or with the county court, if the route extends or is to be extended beyond the limits of said incorporated city, or with private individuals necessary to get the right of way along the public streets of the city, or along the public roads of the county: provided, that no one of the streets of said city shall be used by said company, nor shall any rails be laid down, until the consent of the city authorities has been first obtained, and an ordinance shall have been passed prescribing the terms on which the same may be done, or, if the said road extends into the country, the consent of the county court must be first obtained." Code Mill. & V. § 1921. This provision of the law is confessedly not so perspicuous as might be desired. Nevertheless, we think the intention of the legislature is reasonably certain. The general purpose was to facilitate what the act calls "street railroads," whose lines might extend into the country, upon the public roads of the county, and in some instances, in the town or out of it, pass over the property of private individuals. The right to exercise the powers of eminent domain was not conferred, but withheld, and the only method provided by which the necessary right of way may be obtained is the consummation of a contract with the city authorities, the county court, or private individuals; the manifest intention being that the company must get the permission of the city authorities to run its road upon public streets, of the county court to extend the line on the public roads of the county, and of private individuals when it is deemed necessary to pass over property exclusively their own. Each abutting lot-owner has an easement of way in the public street which the law recognizes as his private property (*Anderson v. Turberville*, 6 Cold. (Tenn.) 158); but that affords no good reason why he should be consulted about the construction of a street railway, when it is remembered that the town or city authorities hold the streets in trust

for the public (*Humes v. Mayor, etc., Knoxville*, 1 Humph. (Tenn.) 403; *Mayor, etc., Nashville v. Brown*, 9 Heisk. (Tenn.) 1), and have the better means of determining what the convenience of the public demands.

The interpretation contended for by the plaintiff would destroy the act itself, and make it a dead letter upon the statute-book; for it cannot be expected that any company could obtain the consent of every abutting lot-owner, so varied are the tastes, thoughts, and habits of persons composing a large community. Moreover, married women, minors, and persons of unsound mind are not competent to make the required contract. So it is seen at once that the effect of such a construction would be to exclude street railways from every street on which an eccentric person, or person under disability, might own property, though the desire and demand for them by the other abutting lot-owners and the city authorities might be unanimous and earnest. It cannot be supposed that the legislature went through the form of passing a general law, intending at the same time that its object should or might be defeated entirely by the will or incompetency of one person in a community, when every other person and the recognized legal agency of the public were endeavoring to get the benefit of the legislation. Certainly the courts will not infer that such was the legislative intent, when it is not clearly so expressed. It is altogether right and reasonable to require the consent of private individuals to the use of property in which the public has no interest. It is with respect to the use of such property, and not with respect to the use of public streets or public roads, that the law requires private individuals to be consulted. If the owner be incompetent to make the requisite contract, it cannot be made, and the property cannot be used, for the public owns no interest in it, and there is no one to represent the incompetent person, as in the case of public highways in the town or country.

Again, the correctness of the interpretation we have given the act is clearly shown by the proviso which permits the construction of the railway along the streets after the consent of the city authorities has been obtained, and terms have been presented by ordinance, without reference to the consent of private individuals. It would be idle to authorize the company to make a contract with private individuals for the use of a public street, and then empower the company to construct its road in such street on the authority of the city alone. No additional light is thrown upon the question by the later provision (found in Code, § 1925) that "the powers herein granted are in no manner to interfere with the rights of private citizens or private property." The meaning of that provision is that plainly expressed by the words used. It is a reservation of the legal rights of private

persons, as they existed before, without increase or diminution,—a saving of all rights of action for any unlawful use or obstruction of the public highways, or other wrongs and abuses.

The plaintiff claimed that, under her deed and the law applicable, she owned the fee in the soil to the centre of the street, and that the use and occupation of the street by the defendant was the imposition of an additional burden, for which she was entitled to recover damages. On the refusal of the court to so charge she assigns error. It is well settled that a steam railway is a

Street railway is not additional burden upon fee of street.

burden not ordinarily contemplated in the dedication or condemnation of land for a public street, and, as a consequence, that the original owner in whom the ultimate fee resides may recover compensation for the subjection of the fee to such new and independent use. 2 Wood, Ry. Law, 724, 740; 1 Ror. R. R. 518; 2 Dill. Mun. Corp. §§ 703-724, 725; Mills, Em. Dom. § 204; Grand Rapids & I. R. Co. v. Heisel, 31 Amer. Rep. 310, 38 Mich. 64; 6 Am. & Eng. Encyc. Law, 552, 553, and cases cited; also Iron Mountain R. Co. v. Bingham, 3 Pickle (Tenn.), — *ante*, 444. A street railway, however, is not regarded as an additional burden upon the fee, but as an improved use, strictly within the purpose for which the street was laid out in the first instance, for which no additional compensation is ordinarily allowable. 2 Wood, Ry. Law, 739; 2 Dill. Mun. Corp. §§ 722, 724; Mills, Em. Dom. § 205; 38 Mich. 68; 6 Am. & Eng. Encyc. Law, 555, and cases cited. Whether the fact that the cars upon a street railway are propelled by "a dummy steam-engine," as in this case, instead of by horse-power, so changed the use as to make it an additional burden for which damages are recoverable, need not be decided in this case, for in reality the plaintiff is not the owner of the fee in the street.

It is true that her deed calls for Monroe street as one of the boundaries of her lot, and that this, as a matter of law, would

Plaintiff had no title to fee of street.

ordinarily invest her with the fee in the soil to the centre of the street, *ad flum viæ*, as a call for a non-navigable stream of water carries title to the thread of the stream, *ad flum aquæ*. But that general rule cannot be applied in this case, for the reason that the person under whom the plaintiff claims title to her lot did not himself own the fee in the street at the time she obtained her deed. He had previously owned the land in the street as well as the abutting lots, but at the time plaintiff acquired title to her lot he had no title to the soil of the street, having long before divested himself of the same by an absolute deed in fee, with covenants of warranty to the city. So that he, at most, had only a private easement of way in the street, and not the fee, when plaintiff bought and took a deed to her lot; and it cannot, of

course, with any show of reason or law, be claimed that she took more than he had to give. That the city first condemned the land for a street does not change the legal effect of his deed, which, in appropriate language, passes the whole fee to the soil for a full and fair consideration recited.

The court instructed the jury that the plaintiff, as an abutting lot-owner, was entitled to the free and unobstructed use of the street for purposes of ingress and egress to and from her lot, and that the impairment of the use for such purposes, if shown by the evidence, would be an element of damages in this case. Plaintiff's counsel insists that this instruction is erroneous, because it

Right of lot-owner to unobstructed ingress and egress.

confines her right of recovery to the impairment of her use of the street for purposes of ingress and egress merely. We think the charge as favorable to the plaintiff as it could have been under the law. An abutting lot-owner, such as the plaintiff is shown to be, without more than an easement of way, and not owning the ultimate fee in the soil, certainly enjoys all that reason entitles her to claim, and all that the law will allow, when she has the free and unobstructed use of the street for all purposes of ingress and egress. For such purposes she may use the whole street, or so much of it as may be necessary, but in so doing she cannot have the exclusive use for herself at all times, nor can she recover damages for the use of it by others, unless such use be excessive or incompatible with her rights as already defined. Her only private property in the street is her right of ingress and egress. She has no other right or interest in the street which is not to be enjoyed equally by each and every member of the community and the public generally. To entitle her to claim damages, she must sustain some private or particular injury. Something must be done which injures her access to her lot on the street before she can sue successfully. Inconvenience or annoyance which she suffers in common with the public gives no right of action. 1 Ror. R. R. 521; 31 Am. Rep. 312; 6 Am. & Eng. Encyc. Law, 530, and cases cited.

As to the effect of the contract with the city authorities, the trial judge charged the jury, in substance, that the defendant would not be liable to abutting lot-owners for damages resulting from the construction of its road along the street, if its work was done in compliance with the terms of its contract with the city. This is not a sound proposition. Manifestly, an unlawful contract with the city could not protect the defendant in doing a wrong to a private person or his property. No contract can legalize an unlawful thing, or shield the wrong-doer from the legal consequence of his wrongful act. The city can no more authorize another to place an unlawful obstruction in the street than it can do so itself. This error, however,

Contract with city does not relieve company from liability if it was illegal.

is harmless in this case, for the record shows that the contract in question was a proper and lawful one, and that the defendant constructed its road according to the contract, and upon the city's established grade of the street. Having constructed its road in a lawful manner, and in accordance with a lawful contract with the city authorities, as required by its charter, the defendant can be liable in damages to the plaintiff only for the unlawful use and operation of its road. Any use that may be excessive or amount to a nuisance will be unlawful, and give the plaintiff a right of action. *Grand Rapids & I. R. Co. v. Heisel*, 31 Amer. Rep. 312; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317; 11 Am. & Eng. R. Cas. 15; 1 Ror. R. R. 521; *Iron Mountain R. Co. v. Bingham*, 3 Pickle (Tenn.), —*ante*, 444. For such unlawful acts, if done, the law allows successive actions. A discussion of the right of successive actions for recurring nuisances, and the measure of damages in such cases is found in an opinion delivered by Special Judge Dickinson, at the present term, in the case of *Harman v. Louisville, N. O. & T. R. Co.*, 3 Pickle (Tenn.), —.

Objection is also made to the charge with respect to a certain water-tank erected and used by the defendant on another lot in the vicinity of plaintiff's property. It is not necessary to notice this charge further than to say that the plaintiff could in no event have a recovery for damages resulting from the proximity and use of the tanks, because she makes no claim for such damages in her declaration. The other errors assigned need not be mentioned in detail. Most of them are necessarily dependent upon and disposed of by rulings already made in this opinion, and the others are not material. Let the judgment be affirmed.

SADLER

v.

SOUTH STAFFORDSHIRE AND BIRMINGHAM DISTRICT STEAM TRAMWAYS CO.

(23 Q. B. Div. 17.)

Street Railway—Statutory Powers—Running Powers Over Line of Other Company—Tramway in Defective Condition—Personal Injuries.—The defendants were a company authorized by act of parliament to run tramcars by steam, and had running powers over the line of another tramway company along a highway. By reason of certain points upon such line being defective, a tramcar of the defendants, while being drawn by a steam-engine, went off the line and injured the plaintiff, who was upon the high-

way. *Held*, that the statutory powers of the defendants could not be taken to authorize them to run their tramcars along the highway upon a tramway in a defective condition: that, the tramway being defective, the defendants in running their tramcar on the highway were doing an unlawful act: and therefore that the defendants were liable as for a trespass in respect of the injury occasioned to the plaintiff by their immediate action.

APPEAL from the judgment of Charles, J., at the trial.

The action was brought in respect of personal injuries to the plaintiff and to recover damages under Lord Campbell's Act in respect of the death of the plaintiff's wife. The facts were in substance as follows. The defendants were a steam tramway company constituted under an act of parliament, and had running powers over a portion of the line of another company, called the Dudley & Stourbridge Tramway Co., which ran along a public highway. There were facing points at a place where the defendants' line joined the Dudley & Stourbridge Tramway Co.'s line for the purpose of enabling the tramcars to pass from one set of rails to another. A tramcar of the defendants, drawn by a locomotive steam-engine, having occasion to pass from one set of rails to the other, the defendants' conductor adjusted the points for that purpose and the engine passed safely over the points, but the tramcar went off the line on to the road and was thrown against the plaintiff and his wife who were standing on the highway, injuring the former and causing the death of the latter. The plaintiff endeavored to show that the speed at which the tramcar was being driven was excessive, and that there was negligence in the management of the car and points by the defendants. The defendants' case was that the accident arose from a defect in the points, and that, those points belonging to the Dudley & Stourbridge Tramway Co., they were not responsible for the consequences of such defect. The defendants' evidence was to the effect that the points were defective in the following respect. One of the points had a movable tongue which was worked by hand, and there was no provision for fixing it while the cars passed. The point was loose at the heel, i.e. the place where the movable tongue hinged, which made the point likely to "kick," i.e. to open during the passage of cars, and it was suggested in evidence at the trial that on the occasion in question the point had "kicked," and the car not following the engine on to the other line had in consequence been dragged off the line. It was admitted that since the accident the defendants had always wedged the point with a chisel or other piece of metal to keep it in position while the cars passed.

It appeared at the trial that these points were on the line of the Dudley & Stourbridge Tramway Co., but there was consid-

erable controversy on the questions whether they belonged to that company or the defendants, and whose duty it was to keep them in order and repair them. It appeared that the Dudley & Stourbridge Co. had on one occasion repaired them at the request of the defendants; and the defendants contended that the duty to repair them rested with that company. The learned judge, however, held that, assuming these matters in favor of the defendants, the defendants were using dangerous plant on a highway, and were responsible for the consequences thereby occasioned to the plaintiff and his wife; and he left to the jury these questions: (1) Was the accident caused by excessive speed; (2) or was it caused by negligent management of the points by the defendants' servants; (3) or was it caused by both those causes; (4) were the points themselves defective; (5) did the defendants know that they were so? The jury answered the fourth question in the affirmative, but the others in the negative. On these findings the judge entered judgment for the plaintiff for damages assessed by the jury.

R. Kettle for defendants.

H. D. Greene, Q.C., and Shakespeare for plaintiff.

LORD ESHER, M.R.—In this case what happened to the plaintiff and his wife appears to me to have happened in consequence of the defendants' immediate action; nothing intervened between their act and the accident. The question is whether they are liable for the accident. The defendants are a tramway company and are no doubt empowered by act of parliament to run their tramcars on the highway. It is impossible to say that to run such cars on the highway, unless the cars and the tramway are in proper condition, is not a dangerous thing. When the act empowers the company for their own benefit to run these tramcars on the highway, it assumes, I think, that it will be the duty of the company to see that the cars and the tramway and all necessary apparatus are kept in proper condition for this purpose. If they fail to do so and the cars or the tramway be in an improper condition, then I think that, in running their cars on the tramway, they would be doing what they are not authorized to do by the act: and I do not see how they could justify what they did on the highway unless they could say that they were doing what their act authorized them to do. In this case the accident happened by reason of a defect not in the defendants' carriage but in the tramway which the defendants by their servants were using. It was said that the defendants had an arrangement with another company to which that tramway belonged by which they had running powers over it, and that the liability to repair that tramway rested on the other com-

Defendants
were bound to
see that rail-
road was in
safe condition.

pany, and the defendants were not liable to keep it in order. As between them and the other company that may be so, but the question here is between them and the public. They were only authorized to be on the highway at all by the act: and as regards the public they could only justify using this tramway if they were doing what the act allowed them to do. As I have said, I think that they were doing what the act did not allow them to do. That being so, and the accident being the result of their immediate action, they are, as it seems to me, liable in trespass in respect of its consequences. They were doing a dangerous thing on the highway by running their steam trams, which they were authorized to run on a tramway in proper condition, upon a tramway which was not in a proper condition, and in so doing I think they were doing what was not authorized by the act and what was therefore an unlawful act as against the public. Then if so, what answer have they? If they could show that what happened was the result of inevitable accident, it might be said that it was not really the result of their action at all. It seems to me impossible to say that this was a case of inevitable accident. In this case the accident was not caused by something external happening over which the defendants had no control. They might have inspected the line and these points and seen the state of them. I cannot see any ground for saying that what happened was the result of inevitable accident. What would be a case of inevitable accident? Suppose, all the apparatus being in proper order, some miscreant had placed a log across the line unobserved, and in consequence the carriages had run off the rails and injured somebody. Possibly a case of that sort might be one of inevitable accident in which the company might not be responsible, although the injury was caused by their acts. Such a case might be like *Holmes v. Mather*, Law Rep. 10 Ex. 261. In that case the horses were not vicious, and the carriage was not out of order, but the barking of a dog frightened the horses. Something over which the defendant had no control caused the horses to run away. The judges in giving judgment in that case said in effect that what caused the accident was the act of the horses in running away, which was occasioned by something over which the defendant had no control; that the horses were running away and neither the defendant nor his servant was really driving them. The present case is not at all analogous to that case. For here the thing which the defendants were using was out of order. The case not being governed by *Holmes v. Mather*, Law Rep. 10 Ex. 261, for the reasons I have given I think the defendants have no answer to an action of trespass to the person. What they did was a wrongful act because they were doing a dangerous thing on a highway which they were

not authorized to do; and it does not under the circumstances seem to me to have been necessary to leave any question to the jury as to negligence on their part. I think the judge below was right, and this appeal should be dismissed.

LINDLEY, L.J.—I am of the same opinion. To understand this case and the view taken of it by Charles, J., it is necessary to bear in mind what the facts were with regard to these points. The accident arose from the defective state of certain points. These points were upon a highway and were used by the defendants, and by the defendants only, though they were on the line of another company. It would appear that the other company repaired them when required by the defendants, but the defendants had for the purpose of running their trams the use and control of these points; and it was because the defendants did not fulfil their duty to see that these points were in order before using them, and used them when out of order, that the accident happened. There can be no question of any inevitable accident in such a case. It was argued that the defendants were not responsible, and I quite agree that to sustain the action for damages against the defendants it must be shown that they were guilty of an unlawful action; and, unless some wrongful act on their part can be shown, they are not liable; but it seems to me that, for the reasons already given, the wrongful act on their part is patent. Under these circumstances I think Charles, J., was right in thinking that there was no question of negligence, and that the defendants were liable because they were guilty of a wrongful act.

LOPES, L.J.—It was the immediate act of the defendants which occasioned the injury to the plaintiff and the death of his wife. There was, therefore, undoubtedly, *prima facie* a trespass to the person. The only question is, whether the defendants had any legal justification or excuse for what they did. If the defendants had been able to show that they were not to blame, and that what happened was the result of inevitable accident, different questions would have arisen as to which I express no opinion. What was the position of the plaintiff and his wife, and of the defendants respectively? The plaintiff and his wife were legally using the highway as they were entitled to do. The defendants were a company authorized to use certain dangerous machinery on the highway. It seems to me that that authority was to use such machinery in proper condition, not to use it in an improper and defective condition. The jury have found that the points were defective: the defendants therefore were using the machinery, which they were authorized to use in a proper condition, while it was in a defective and improper

condition. The jury it is true found that they did not know that it was in a defective condition; but nevertheless they used it in such condition, and by such use of it the plaintiff and his wife were injured. I think under these circumstances the defendants were guilty of a tortious act towards the plaintiff and were liable for the consequences in trespass. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

WIEDMAN

v.

NEW YORK ELEVATED R. CO.

(*New York Court of Appeals, Second Division, June 4, 1889.*)

Elevated Railroad—Personal Injuries—Sparks from Locomotive—Negligence.—In an action against an elevated railroad company, the plaintiff testified that while she was walking along the street a piece of hot coal smaller than a pin-head fell from a passing locomotive into her eye and injured it. There was no evidence that the locomotive from which the coal came was defective in design, construction, condition, or operation, and that it was not supplied with the best known appliances for arresting sparks and cinders; nor did it appear that more than this one coal came from the locomotive on this occasion, or that sparks or coals were emitted from it or from any of defendant's locomotives on other occasions. *Held*, that the evidence was not sufficient to sustain a verdict for the plaintiff.

Same—Condition of Locomotives—Burden of Proof.—In such action, as plaintiff did not, by her complaint or evidence, inform the company from which train the coal fell, or give any information which could enable the defendant to ascertain that fact, the fact that the defendant did not voluntarily assume the burden of showing the condition of the locomotives in use on that part of its road, ought not to have been allowed to weigh with the jury.

POTTER and BRADLEY, JJ., dissenting.

APPEAL from General Term of the Supreme Court, First Department.

In the afternoon of August 18, 1879, as the plaintiff was walking north on the east sidewalk of Third avenue in the city of New York, between One Hundred and Twenty-Sixth and One Hundred and Twenty-Seventh streets, a hard substance entered and injured her right eye. At this time the defendant operated an elevated railroad in this avenue, by locomotives which were propelled by the power of steam.

Facts.

The plaintiff alleged in her complaint that the substance which

entered her eye was a hot coal, and that it fell from a passing locomotive by reason of defendant's neglect to furnish it with proper appliances to prevent the emission of sparks and burning coals, and by reason of the negligent manner in which the defendant at the time operated the locomotive. The defendant admitted that it was a corporation engaged in operating an elevated railroad by the power of steam in Third avenue and other streets, but denied all of the other allegations in the complaint. The plaintiff testified: "Question. On the afternoon of August 18, 1879, did you take a walk with your two children? Answer. Yes, sir. Q. Walking along the sidewalk towards Harlem bridge? A. Yes, sir. Q. State to the jury what happened. A. I went towards One Hundred and Twenty-Seventh street, and a spark of fire flew from the engine into my eye,—a piece of hot coal fell upon my eye. Q. Which eye was it? A. The right eye. I suffered so much during the whole night that in the morning I went down to Weber's drug-store. I asked him if he could see anything in my eye; that a coal fell from the elevated road,—and he took a little brush and put it in my eye, and brushed out a piece of coal, because I got pain from the eye. I suffered all the time. Q. How large a piece of coal was it? A. Not quite as large as a pin-head. Q. Was it burning coal? A. Yes, sir. Q. How soon after this piece of coal flew in your eye did you call upon Mr. Weber? A. On Monday morning, about 7 o'clock. . . . Q. Where did it happen that the piece of coal from defendant's engine flew into your eye? A. Near One Hundred and Twenty-Seventh street, on the right-hand side. Q. What did Mr. Weber do to the eye? A. He took a little brush and brushed the piece of coal out." Cross-examined by defendant's counsel: "Question. You did not go to Mr. Weber the same day that the injury occurred? Answer. No, sir. Q. Was the eye painful as soon as the cinder went into it? A. Yes, sir; it pained all the time, like as if there was fire in it. Q. And that is the reason that you think it was a burning cinder? A. Yes, sir. . Q. You did not see the cinder burning? A. Fire flew down, and a piece of hard-coal fire flew in my eye. Q. You bathed it all night in cold water? A. Yes, sir. Q. Did you see the cinder come from the engine? A. I saw fire come down, and a piece came into my eye. Q. You do not positively know that it came from the road? A. Yes, sir. Q. Did you see it come all the way down? A. I saw that the fire flew from the elevated, and a piece flew into my eye. Q. I should think you would have turned your eye away when you saw it coming, or turned your head. Did you not think of that? Did not that occur to you, to turn your eye away? A. No, sir. Q. You saw the cinder coming all the way from the train? A. Yes, sir. Q. Until it reached you? A. Yes, sir. Q. When

you saw it coming, why did you not turn away your eye? A. It came so quick. Q. I understand you to say that you saw it come all the way from the train to your eye? A. The fire flew down, and the piece flew into my eye. Q. Did you see it start from the engine? A. I saw the fire that flew down; and, as soon as it got down, I had it in my eye. Q. You saw something coming in the air that struck your eye? A. Fire flew from the engine, and I got a piece of it in my eye. Q. You saw it all the way from the engine? A. Yes, sir. It flew so quick; and it flew in my eye so quick." The foregoing is all of the evidence tending to establish the defendant's liability; and, after giving evidence bearing upon the question of damages, the plaintiff rested. The defendant offered no evidence, and moved to dismiss the complaint upon the ground that the plaintiff had not established a cause of action. The motion was denied, and the defendant excepted. The defendant then asked the court to direct a verdict for the defendant upon the same ground, which was denied, and an exception taken. The jury rendered a verdict for \$2000, which was set aside, and a new trial ordered at circuit, upon a motion made upon the minutes. This order was reversed by the general term, and a judgment ordered for the plaintiff on the verdict, which was entered, and from which and the order the defendant appeals.

Edward S. Rapallo for appellant.

Charles Steckler for respondent.

FOLLETT, C.J.—Each party to this action was rightfully in this street, and engaged in a lawful pursuit. No contractual relations existed between them, and neither owed the other any duty not due to all persons lawfully using the street. There is no direct evidence that the locomotive from which the coal came was defective in design, construction, condition, or operation, or that it was not supplied with the best known appliances for arresting sparks and cinders. It does not appear that more than this one coal came from the locomotive on this occasion, or that sparks of coals were emitted from it, or from any of defendant's locomotives, on other occasions. There is no evidence that on this occasion the employees in charge of defendant's train did an act which ought not to have been done, or omitted to do an act which ought to have been done. The counsel for the plaintiff contends that the evidence is sufficient, in the absence of explanatory evidence in behalf of the defendant, to authorize the jury to infer from the falling of this coal that the defendant negligently used a locomotive improperly designed, defectively constructed, out of repair, or negligently operated. The evidence discloses an isolated, colorless fact,—the emission of a coal

Evidence held insufficient to show defendant's negligence.

smaller than a pin-head,—and the rule, *res ipsa loquitur*, has not been extended far enough to authorize the inference from this fact that the defendant was guilty of actionable negligence.

It is urged that the rule that the burden is upon the party averring negligence to affirmatively establish it should not be given its usual force or signification in this case, because it is said that the defendant could more easily have proved the con-

Burden of proof not on defendant to show that locomotives were in good order.

dition of the locomotive than the plaintiff. The plaintiff did not, by her complaint or evidence, inform the defendant from which train the coal fell, in which direction the train was going, the hour of the accident, or of any fact by which the defendant could have learned which locomotive emitted the coal; and, in the absence of the slightest evidence that defendant knew, or had the means of identifying, the locomotive complained of, or that there were appliances in general use by which the emission of sparks of the size of the one which entered the plaintiff's eye might have been prevented, we think the fact that the defendant did not voluntarily assume the burden of showing the condition of all of its locomotives in use on that part of its line during the afternoon of August 18, 1879, should not have been allowed to weigh with the jury. The evidence of negligence in the case at bar falls far short of that given in *Ruppel v. Manhattan R. Co.*, 13 Daly (N. Y.), 11; *Burke v. Manhattan R. Co.*, *Ib.* 75; or in *McNaier v. Manhattan R. Co.*, 46 Hun (N. Y.), 502, second appeal, 4 N. Y. Supp. 310. The judgment should be reversed, and a new trial ordered, with costs to abide the event. All concur, except POTTER and BRADLEY, JJ., dissenting.

WOODMAN

v.

METROPOLITAN R. CO.

(*Massachusetts Supreme Judicial Court, May 31, 1889.*)

Personal Injuries—Obstruction of Street—Negligence—Evidence.—Plaintiff's testator was injured by a fall in the street. He was seen to fall and was picked up senseless at a point where some rails projected beyond a temporary barrier inclosing a place where defendant was having a track laid. There was no evidence of any other possible cause of the fall. There was some evidence that it was dark at that place, and it also appeared that it was not a regular crossing. *Held*, that the evidence was sufficient to sustain a finding for the plaintiff.

Same—Independent Contractor—Permit Issued to Company.—When the laying of a track necessitates the digging up of a highway and the obstruc-

tion of it with earth and materials, the obstruction so formed is a nuisance unless properly guarded against, and the railroad company is liable for injuries caused thereby when the work is done under a permit issued to it, although the work had been let out by it to an independent contractor.

EXCEPTIONS from Superior Court, Suffolk County.

Action against the Metropolitan R. Co. by Sarah A. Woodman, administratrix, etc., to recover damages for injuries sustained by the testator on the evening of October 15, 1885, between the hours of 6 and half-past 6 o'clock. The jury having returned a verdict for the plaintiff, the defendant excepts.

R. M. Morse, Jr., and *M. Morton, Jr.*, for plaintiff.

M. F. Dickinson, Jr., and *G. D. Braman* for defendant.

HOLMES, J.—The plaintiff's testator was injured by a fall in the street. He was seen to fall, and was picked up senseless at a point where some rails projected beyond a temporary barrier inclosing a place where the defendant was having a track laid. There was no evidence of any other possible cause of the fall. This warranted a finding that he tripped over the end of the rails.

Evidence sufficient to sustain finding for plaintiff.

The street was a public highway, and the jury very properly might find that it was negligent to allow the ends of the rails to project beyond the barrier, especially if they believed that it was dark at the place, as one witness testified, although the weight of the testimony looks the other way on paper. There was testimony that the plaintiff was walking in the usual way just before he fell. Taking into account what he had a right to assume with regard to that part of the street which was not inclosed with barriers, the jury was warranted in finding that he was using due care. *Lyman v. Hampshire*, 140 Mass. 311, 314; *Learoyd v. Godfrey*, 138 Mass. 315, 324. Indeed, if they believed that it was dark, they might have considered that the plaintiff had been led into a trap. It is suggested that he was not crossing at a regular crossing. But his rights were not changed by a slight change in the pavement. He had a right to cross where he chose, if the jury thought he used due care. *Raymond v. Lowell*, 6 Cush. (Mass.) 524; *Gerald v. Boston*, 108 Mass. 580.

It is argued that the work was done by an independent contractor. Assuming that there was evidence warranting that conclusion, we are of opinion that the fact would not exonerate the defendant. In some cases, a party is liable, notwithstanding the intervention of an independent contractor, lawfully employed. A plain case is when he is made personally responsible by statute for the prevention of the cause of the damage complained of. *Gray v. Pullen*, 5 Best & S. 970. Thus it

Fact that work done by independent contractor does not relieve defendant.

is settled in many states that a city charged with the duty of keeping the streets in repair is answerable for an improperly guarded excavation made by a contractor, for instance, in building a sewer. *Storrs v. Utica*, 17 N. Y. 104; *Detroit v. Corey*, 9 Mich. 165; *Birmingham v. McCary*, 84 Ala. 469; *Logansport v. Dick*, 70 Ind. 65; *Houston & G. N. R. Co. v. Meador*, 50 Tex. 77; *Circleville v. Neuding*, 41 Ohio St. 465, 469, 9 Am. & Eng. Corp. Cas. 656; *Baltimore v. O'Donnell*, 53 Md. 110; *Robbins v. Chicago*, 4 Wall. (U. S.) 657, 679; *St. Paul Water Co. v. Ware*, 16 Wall. (U. S.) 566. In the present case it would not stretch the words of the public statute and of the defendant's charter very much to say that such a personal duty was imposed upon it. Pub. St. c. 113, § 32; St. 1853, c. 353, § 3. See *Quested v. Newburyport & A. H. R. Co.*, 127 Mass. 204; *Osgood v. Lynn & B. R. Co.*, 130 Mass. 492, 3 Am. & Eng. R. Cas. 395; *Brookhouse v. Union R. Co.*, 132 Mass. 178; *Braslin v. Somerville H. R. Co.*, 145 Mass. 64. But, further, apart from statute, if the performance of a lawful contract necessarily will bring wrongful consequences to pass, unless guarded against, and if as in the present case the contract cannot be performed except under the right of the employer who retains the right of access to the premises, the law may require the employer at his peril to see that due care is used to prevent harm, whatever the nature of his contract with those whom he employs. *Sturges v. Theological Educ. Soc.*, 130 Mass. 414; *Stewart v. Putnam*, 127 Mass. 403, 407; *Gorham v. Gross*, 125 Mass. 232, 240; *Bower v. Peate*, L. R. 1 Q. B. Div. 321, approved in *Dalton v. Angus*, L. R. 6 App. Cas. 740, L. R. 4 Q. B. Div. 162, L. R. 3 Q. B. Div. 85; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Hole v. Sittingbourne & S. R. Co.*, 6 Hurl. & N. 488, 500; *Circleville v. Neuding*, *ubi supra*. Laying the track for the defendant necessitated the digging up of the highway, and the obstruction of it with earth and materials. This obstruction would be a nuisance, unless properly guarded against. The work was done under a permit issued to the defendant, and considering the general principle of the law, and also the special relations of horse-railroads to the highway, and the policy of the statutes, so far as the legislature has expressed itself upon the subject, we are of opinion that the defendant, having caused the highway to be obstructed, was bound at its peril to see that a nuisance was not created. *Veazie v. Penobscot R. Co.*, 49 Me. 119, 123. See also *Darmstaetter v. Moynahan*, 27 Mich. 188. Exactly how far this principle shall be carried is a question of nicety. But on the whole we are of opinion that the present case falls within it, and does not resemble those where the cause of injury was an application of force to the person or property of the plaintiff by a transitory act or by a defect in machinery. Exceptions overruled.

PHILADELPHIA TRACTION CO.

v.

BERNHEIMER.

(Pennsylvania Supreme Court, April 22, 1889.)

Cable Railroad—Injuries to Horse—Negligence of Gripman—Evidence.—Plaintiff, who had hitched his horse to an awning-post, untied the hitching-strap while standing on the pavement with some boxes between the horse and himself. Just then a cable car came along, and the ringing of the bell alarmed the horse. It pulled the strap from plaintiff's hand, ran upon the track, and was struck by a cable car. Plaintiff testified that, when the horse reached the track, the cable car was about 18 to 20 feet distant. He also testified that the gripman could have stopped the car and seen the horse, but there was no evidence to corroborate his testimony in that respect. *Held*, that there was not sufficient evidence to submit to the jury the question whether the gripman was negligent in not stopping the car in time to prevent a collision, the plaintiff not being qualified to express an opinion upon that point; that the ringing of the bell was not negligence; and that plaintiff could not recover.

ERROR to Court of Common Pleas, Philadelphia County.

Action by Moses Bernheimer against the Philadelphia Traction Co., to recover damages for injuries to a horse belonging to plaintiff. Judgment having been rendered for the plaintiff, defendant sued out a writ of error.

David W. Sellers for plaintiff in error.

Emanuel Furth and *Jacob Singer* for defendant in error.

PAXSON, C. J.—The horse of the plaintiff below was hitched to an awning-post on the south side of Market street about 22 feet east of Fourth street. The plaintiff, while standing on the pavement, with some boxes between the horse and himself, untied the hitching-strap. Just then a cable car came along, and the ringing of the bell alarmed his horse, and it broke away from him. He testified: "My horse pulled strap from my hand. There were some boxes in the way, and I could not get around to reach him, and cable car struck him, and I ran down Market street after my horse and wagon. The ringing of the bell started the horse. . . . I think the car could have been stopped before it touched the horse. When the horse reached the track the cable car was about 18 to 20 feet off. The gripman could have stopped the car and seen the horse." No other witness appears to have been called. We may safely con- Facts.

clude from his own statement that the plaintiff was not a horse-man. No one accustomed to such animals would ever think of unhitching his horse in a crowded street with a pile of boxes between the horse and himself, which obliged him to go around them before he could take hold of it. Had the boxes not been in his way he could have held his horse when frightened by the bell. It was an act of gross negligence to unhitch it in the manner he did, and, had the point been raised upon the trial, it should have prevented a recovery. We decide the case, however, upon other grounds.

There was no evidence of negligence on the part of the company. It was not negligence to ring the bell as the car approached Fourth street. It would have been negligence not to have done so. Was it negligence in the gripman not to stop

No evidence of negligence on part of defendant.

the car in time to prevent a collision? Upon this point there was no sufficient evidence to submit to the jury. It is true the plaintiff said, "I think the car could have been stopped." Afterwards he was more positive and said, "The gripman could have stopped the car." This was a mere opinion, based upon no knowledge or experience in handling or working cable cars. In *Fischer v. Camden & P. Steamboat Ferry Co. (Pa.)*, 16 Atl. Rep. 635, it was said, of an inexperienced witness who had testified that the pilot of a steamboat might have changed its course in time to have avoided a collision: "He was a mere passenger; knew nothing of navigation or the handling of a steamboat; and it would be as rational to call a cobbler as an expert in medical science as to permit a jury to render a verdict upon such testimony as this." The plaintiff in this case knew nothing of handling or stopping a cable car. He did not even know how to manage his horse; and it would be unjust to let this question of fact go to the jury upon such testimony. The gripman was not bound to know that the horse would run against his car. It was only 18 feet from the car when it reached the track, and the car would move that 18 feet in less than a second of time. The assignments of error are all sustained. There was no question of negligence to submit to the jury. Judgment reversed.

Accident on Street Railway—Contributory Negligence—Carelessness of Plaintiff.—While a car of the defendants, in charge of another servant of the company, the driver having temporarily gone to the rear of the car, was proceeding westerly at a slow rate along a street in the city of T., on which they had the right of way, the plaintiff, whose carriage was waiting at the curbstone, without observing the near approach of the car, got into and drove her carriage for a short distance in the same direction as the car, when she suddenly turned north, intending to cross, but in such close proximity to the car that, but for the prompt action of the driver in charge in turning his horse off the track, the horse would have collided with the

plaintiff's carriage; as it was, notwithstanding the brake was applied to the car, the whiffletree struck the wheel of the carriage, which was upset, and the plaintiff thrown to the ground, and her leg was fractured. In an action for damages the jury found in favor of the plaintiff. *Held*, that there was no evidence of negligence on the part of the defendants, and the action must be dismissed with costs. *Follett v. Toronto St. R. Co.*, 15 Ont. App. Rep. 246.

STONE

v.

DRY DOCK, EAST BROADWAY AND BATTERY R. CO.

(*New York Court of Appeals, June 4, 1889.*)

Contributory Negligence—When Infant is Sui Juris—Province of Jury.—In an action against a street railway company to recover damages for injuries to a girl seven years of age, the question whether the child is *sui juris* and guilty of such contributory negligence in crossing the street in front of an approaching car as would bar a recovery, is for the jury, the negligence of the driver of a car being admitted by the defendant.

APPEAL from General Term of the Supreme Court, First Department.

Action against the Dry Dock, East Broadway & Battery R. Co. to recover damages for the death of plaintiff's infant child, Sarah Stone, who was run over by a car belonging to defendant in Canal street, New York. At the close of the evidence on behalf of the plaintiff, the trial judge on defendant's motion dismissed the complaint and directed judgment to be entered in favor of the defendant. Plaintiff thereupon appealed to the general term of the supreme court, where the decision of the trial judge was affirmed (see 46 Hun (N. Y.), 184). Plaintiff again appealed.

Adolph L. Sanger for appellant.

Robinson, Scribner & Bright for defendant.

ANDREWS, J.—The nonsuit was placed on the ground that an infant seven years of age was *sui juris*, and that the act of the child in crossing the street in front of the approaching car was negligence on her part which contributed to her death, and barred a recovery. We think the case should have been submitted to the jury. The negligence of the driver of the car is conceded. His conduct in driving rapidly along Canal street at its

Whether infant seven years of age is *sui juris* is for jury.

intersection with Orchard street, without looking ahead, but with his eyes turned to the inside of the car, was grossly negligent. *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *Washington & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 401. It cannot be asserted as a proposition of law that a child just passed seven years of age is *sui juris*, so as to be chargeable with negligence. The law does not define when a child becomes *sui juris*. *Kunz v. City of Troy*, 104 N. Y. 344. Infants under seven years of age are deemed incapable of committing crime, and by the common law such incapacity presumptively continues until the age of fourteen. An infant between those ages was regarded as within the age of possible discretion; but on a criminal charge against an infant between those years the burden was upon the prosecutor to show that the defendant had intelligence and maturity of judgment sufficient to render him capable of harboring a criminal intent. 1 Arch. Crim. Pr. & Pl. 11. The Penal Code preserves the rule of the common law, except that it fixes the age of twelve instead of fourteen as the time when the presumption of incapacity ceases. Penal Code, §§ 18, 19.

In administering civil remedies the law does not fix any arbitrary period when an infant is deemed capable of exercising judgment and discretion. It has been said in one case that an infant three or four years of age could not be regarded as *sui juris*, and the same was said in another case of an infant five years of age. *Mangam v. Brooklyn R. Co.*, *supra*; *Fallon v. Central Park, etc., R. Co.*, 64 N. Y. 13. On the other hand, it was said in *Cosgrove v. Ogden*, 49 N. Y. 255, that a lad six years of age could not be assumed to be incapable of protecting himself from danger in streets or roads; and in another case that a boy of eleven years of age was competent to be trusted in the streets of a city. *McMahon v. Mayor, etc., of New York*, 33 N. Y. 642. From the nature of the case it is impossible to prescribe a fixed period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things,—such as natural capacity, physical conditions, training, habits of life, and surroundings. These and other circumstances may enter into the question. It becomes, therefore, a question of fact for the jury where the inquiry is material, unless the child is of so very tender years that the court can safely decide the fact.

The trial court misapprehended, we think, the case of *Wendell v. New York Cent. & H. R. R. Co.*, 91 N. Y. 420, 14 Am. & Eng. R. Cas. 663, in supposing that it decided as a proposition of law that a child of seven years was capable of exercising judgment so as to be chargeable with contributory negligence. It was assumed in that case, both on the trial and on appeal, that the child whose conduct was in question was capable of

understanding and did understand the peril of the situation, and the evidence placed it beyond doubt that he recklessly encountered the danger which resulted in his death. The boy was familiar with the crossing, and, eluding the flagman, who tried to bar his way, attempted to run across the track in front of an approaching train in plain sight, and unfortunately slipped and fell, and was run over and killed. It appeared that he was a bright, active boy, accustomed to go to school and on errands alone, and sometimes was intrusted with the duty of driving a horse and wagon, and that on previous occasions he had been stopped by the flagman while attempting to cross the track in front of an approaching train, and had been warned of the danger. The court held upon this state of facts that the boy was guilty of culpable negligence. But the case does not decide as matter of law that all children of the age of seven years are *sui juris*. We are inclined to the opinion that in an action for an injury to a child of tender years, based on negligence, who may or may not have been *sui juris* when the injury happened, and the fact is material as bearing upon the question of contributory negligence, the burden is upon the plaintiff to give some evidence that the party injured was not capable, as matter of fact, of exercising judgment and discretion. This rule would seem to be consistent with the principle now well settled in this state, that in an action for a personal injury, based on negligence, freedom from contributory negligence on the part of the party injured is an element of the cause of action. In the present case the only fact before the jury bearing upon the capacity of the child whose death was in question was that she was a girl seven years and three months old. This, we think, did not alone justify an inference that the child was incapable of exercising any degree of care. But, assuming that the child was chargeable with the exercise of some degree of care, we think it should have been left to the jury to determine whether she acted with that degree of prudence which might reasonably be expected under the circumstances of a child of her years. This measure of care is all that the law exacts in such a case. *Thurber v. Harlem Bridge, etc., R. Co.*, 60 N. Y. 335. The child was lawfully in the street. In attempting to cross she was struck by the horse on the defendant's car, and was run over and killed. The evidence would have justified the jury in finding that when the child stepped down from the curb-stone the car was 50 or more feet away, and the distance from the curb-stone to the track of the defendant's road was less than 12 feet. The child, if she saw the car, might very well have supposed that she could get over the track before the car passed. There is evidence that the speed of the car was increased at about the time the child started to cross. It would be very unjust to

exact of such a child that degree of care which an adult would exercise under similar circumstances. It was, we think, for the jury to say whether the child's conduct was unusual or unnatural for a child of her years. She probably did not appreciate the rapidity of movement of the car; nor could it be expected that she would weigh the circumstances, or fully understand the danger of attempting to cross in front of the car. The negligence of the defendant's driver is conceded, and it was for the jury to judge whether the conduct of the child in crossing the street to join another child engaged in roller-skating on the opposite side was characterized by any want of that degree of care which children under similar circumstances would usually exercise. There is no question in the case of negligence on the part of the parent of the child. That point was not presented on the motion for nonsuit. The judgment should be reversed, and a new trial granted. All concur.

Contributory Negligence of Infants.—See *Erwin v. St. Louis, I. M. & S. R. Co. (Mo.)*, 35 Am. & Eng. R. Cas. 390, note, 394.

SNOOK

v.

GEORGIA IMPROVEMENT CO.

(*Georgia Supreme Court, July 27, 1889.*)

Subscription to Stock—Enforcement—Change of Terminus—Increase of Capital.—If a railroad company, without the consent of a stockholder, applies to the legislature and obtains an amendment to its charter which changes one of its *termini* and increases the capital stock, the stockholder is not thereafter bound by his subscription, although, when he subscribed, the general law, under which the first charter was obtained, authorized amendments to be made to the charter, the route to be changed, and the capital stock to be increased.

Charter—General Law—Special Acts—New Charter.—After a company had been incorporated under the general railroad law, the legislature passed an act entitled "An act to incorporate the A. & H. R. Co., to confer certain powers, privileges, etc., and for other purposes." The incorporators named in the act were not the same as the incorporators in the original corporation. The act declared that "they are hereby created a body politic and corporate," and gave them all the powers necessary for a railroad company. Subsequently an amendatory act was passed, which changed the name of the company and authorized the extension of the railroad. *Held*, that these acts were not amendments to the charter

granted under the general railroad law, but were a separate and distinct charter granted by the legislature.

ERROR from City Court of Atlanta.

T. W. Birney and *Abbott & Smith* for plaintiff in error.

Payne & Hull for defendant in error.

SIMMONS, J.—The Georgia Improvement Co. brought its action against Snook for \$250, which it alleged Snook had subscribed to the Atlanta & Hawkinsville R. Co., now the Atlanta & Florida R. Co., the name having been changed by an act of the legislature approved October 24, 1887. Case stated. To this action Snook filed the plea of the general issue, and four special pleas. The plaintiff demurred to the special pleas. Its demurrer was sustained by the court, and the plaintiff had a verdict. The defendant moved for a new trial, which was refused by the court, and he excepted.

The main question in this case is whether the court erred in sustaining the demurrer to the defendant's special pleas. The view we take of the case renders it unnecessary for us to discuss all the pleas which were stricken by the court. The only ones we will discuss are the third and fifth, because, if they are sufficient in law, and are true, the plaintiff cannot recover. The third plea, after being stripped of its redundancy and superfluous verbiage, is, in substance, that the defendant subscribed for \$250 of stock in the Atlanta & Hawkinsville R. Co., which had been incorporated under the general railroad law; that the charter granted to said corporation provided that the railroad should run from Atlanta to Hawkinsville, through certain counties named in the charter; that subsequently to this charter, and to his subscription, said company, through its directors, applied to and obtained from the legislature another charter, which charter changed the capital stock from \$250,000 to \$500,000, and changed the route of the road, and allowed said company to construct a line from Atlanta in a southerly direction to or near Hawkinsville, or to or near Thomasville in Thomas county, or both, and run through such counties as might be necessary to one or both of said points. The plea further alleges that afterwards, on the 24th of October, 1887, said Atlanta & Hawkinsville R. Co. procured the legislature to pass another act, in which the name of the company was changed to the Atlanta & Florida R. Co., and the route changed, the company being allowed to make various extensions and branches from Thomasville to any point on the state line of Florida. The plea further alleges that each of these changes was material, and without the defendant's consent, and had not been considered or anticipated in his contract to take stock, and that he was

therefore released from obligation to do so. The fifth plea alleges, in substance, that the original scheme contemplated by the original corporators of the Atlanta & Hawkinsville R. was given up and abandoned, and the subscribers thereby released; and that afterwards certain persons (naming them) applied to the legislature, and obtained from it a charter under the name of the Atlanta & Hawkinsville R. Co., which company, under the name of the Atlanta & Florida R. Co., made the alleged transfer of his subscription to the plaintiff. He alleges that said company was a different one from the one to whose capital stock he had subscribed, and that he had never subscribed to the stock of the Atlanta & Florida R. Co.

1. We think the court erred in sustaining the demurrer to these pleas. The doctrine is now well settled that if the charter of a corporation is materially, fundamentally, or radically changed by the legislature after a person has subscribed for stock therein, without his consent, he is released from such subscription. On this subject the only difference in the decisions of the court now is as to what amounts to a material, fundamental, or radical change. They hold that this is a question of law to be decided by the courts, and not a question of fact for the jury. Most of them hold that no general rule can be laid down as to what is a material or fundamental change, but that each case must be determined upon its own state of facts.

It is also held that the charter of a corporation is a contract of a dual character,—First, a contract between the state which grants the charter and the corporation; and, secondly, a contract between the corporation and its members; and while the state, if it reserves the power to do so, can alter and amend the charter, and the corporation itself cannot object to the alteration or amendment, yet the state has no power to make any material or essential alteration in the contract between the members themselves and the corporation. *Winter v. Muscogee R. Co.*, 11 Ga. 438; *Wilson v. Mills Valley R. Co.*, 33 Ga. 466; *Railroad Co. v. Sullivan*, 57 Ga. 240; *Central R. Co. v. Collins*, 40 Ga. 617; *Thomp. Liab. Stockh.* § 70; 1 Ror. R. R. 147, 200; *Pierce, R. R.* 68; *Witter v. Mississippi, etc.*; R. Co., 20 Ark. 463; *Plank-Road Co. v. Arndt*, 31 Pa. St. 317; *Macedon & B. Plank-Road Co. v. Lapham*, 18 Barb. (N. Y.) 315; *Buffalo, C. & N. Y. R. Co. v. Pottle*, 23 Barb. (N. Y.) 21; *Stevens v. Rutland R. Co.*, 29 Vt. 545; *Fry's Ex'r v. Lexington, etc., R. Co.*, 2 Metc. (Ky.) 314; *Thompson v. Guion*, 5 Jones Eq. 118; *Middlesex Turnpike Co. v. Locke*, 8 Mass. 267; *Hester v. Memphis & C. R. Co.*, 32 Miss. 378; *Kenosha, R. & R. I. R. Co. v. Marsh*, 17 Wis. 13; *Marietta & C. R. Co. v. Elliott*, 10 Ohio St. 57; *Chartiers R. Co. v. Hodgins*, 77 Pa. St. 190; *Caley v. Philadelphia*,

etc., R. Co., 80 Pa. St. 368. As to the character of the contract between the state and the corporation and between the subscribers to the stock of the corporation, and as to the power of the state to alter or amend the charter, see an able and learned discussion of the subject by Chancellor Zabriskie in *Zabriskie v. Hackensack, etc.*, R. Co., 18 N. J. Eq. 178.

Applying these rules to the facts of this case, we find that certain persons obtained a charter under the general railroad law, authorizing them to construct a railroad from Atlanta to Hawkinsville. After this was done Snook subscribed \$250, for which amount he is sued in this action. The capital stock, at the time of his subscription, was \$250,000. Afterwards the company, without Snook's assent, applied to the legislature and obtained an amendment to the charter, or a new charter (whether it be an amendment or a new charter is immaterial for the purposes of this argument), which changed the southern terminus, and the capital stock of the railroad from \$250,000 to \$500,000. When Snook made his subscription the charter of the company designated Hawkinsville as the southern terminus, and his subscription was made under the terms of that charter. That charter was the constitution and the law to him and the other subscribers. He agreed with them and the company that he would pay so much in order to have a road constructed from Atlanta to Hawkinsville. According to his plea, nothing was said, anticipated, or contemplated about any other southern terminus. Nor was anything said about an increase of the capital stock from \$250,000 to \$500,000, or to \$2,000,000, as afterwards provided by the act of 1887. Snook may have been willing to subscribe for the construction of a railroad from Atlanta to Hawkinsville. He may have owned property at Hawkinsville, or may have had other good reasons for desiring to have the terminus there; and he may have been unwilling for the terminus to be changed from Hawkinsville to Thomasville. He may also have been willing to embark in the enterprise when the capital stock was only \$250,000, and may have been unwilling to have the capital stock increased to \$2,000,000. Whether willing or unwilling, he stands upon his express contract, which he made with the company and the other subscribers, that the southern terminus should be at Hawkinsville, and its capital stock only \$250,000; and, in our opinion, he had the right to stand upon that contract, and neither the company nor the legislature had a right to change his contract so that the southern terminus of the road should be at Thomasville, and the capital stock \$2,000,000, without his consent. But it is argued that when he subscribed the general law under which the first charter was obtained authorized amendments to be made

Change in terminus and amount of capital stock sufficient to release subscription.

to the charter, the route to be changed, and the capital stock increased. If this be true, the particular mode and method as to how these changes may be made was pointed out in the general law. The increase of the capital stock could only be done by vote of the stockholders, and the change of route could only be made by a two-thirds vote of the directors; and it may be that he could insist upon its being done in the mode contemplated by the charter of the company to whose stock he had become a subscriber. Whether this be true or not, the general law, under which the first charter was obtained, nowhere provides for a change of terminus of the road after the terminus has been agreed upon by the stockholders. It provides for a change of route between the termini, and provides for branch roads and extensions; but, as said before, it gives no authority to the stockholders or the directors, or the legislature, to change the terminus of the road. The weight of authority is to the effect that a change of the terminus of a road is a fundamental alteration, which releases the subscriber who subscribed to the stock before the change was made, if made without his consent. For these reasons, and for others which might be added, we hold that this change was a material and fundamental one, and that the defendant was released from his subscription. Of course, if it should appear upon the trial that the facts stated in the plea are untrue, and that the railroad was constructed to Hawkinsville, and no change of terminus made, or that, if it has been changed, Snook assented to it, then he would not be released.

2. We think the court erred also in sustaining the demurrer to the fifth plea. We think that the act of 1886 is not an amendment to the original charter of the Atlanta & Hawkinsville R. Co., obtained under the general law, but is a separate, independent, and distinct charter. The title to the act is: "An act to incorporate the Atlanta & Hawkinsville R. Co., to confer certain powers and privileges on said company, and for other purposes." Acts 1886, p. 102. The first section of the act then names the incorporators, and they are not the same altogether as the incorporators in the original act. The act further says, after naming these persons, that "they are hereby created a body politic and corporate, under the name," etc., and then proceeds to give them all the powers that are necessary for any railroad company whatever, the right to sue and be sued, to hold property, to condemn land, to mortgage. The amount of the capital stock is fixed, and the right given to join with other railroads. Certain persons are appointed directors, to act until a regular election can be held by the stockholders, etc. This act was passed and approved in December, 1886. The legisla-

Act held to
grant new
charter and
not to operate
as amendment.

ture which passed the act adjourned in December until the summer of 1887, when the same body amended this act of the preceding session. The title to this amendatory act is as follows: "An act to amend the charter of the Atlanta & Hawkinsville R. Co., to change the name thereof to the Atlanta & Florida R. Co., to authorize the extension thereof to the Florida line, and for other purposes." The first section of that act recites that "the name of the railroad corporation chartered heretofore by the act of this legislature under the name of the Atlanta & Hawkinsville R. Co. be changed to the Atlanta & Florida R. Co." The sixth section of the act says that "said railroad company shall have, in the construction of said extension, all the rights, powers, privileges, and immunities granted to and conferred upon the Atlanta & Hawkinsville R. Co. by the legislature of Georgia, by act approved December 7, 1886." Construing these two acts together, and the phraseology of the acts, and the fact that the corporators in the original charter and those mentioned in the act of 1886 are not entirely the same, we conclude that these acts are not amendments to the charter granted under the general railroad law, but a separate and distinct charter granted by the legislature. If they intended to incorporate the same company as that already incorporated under the general law, they certainly attempted a very useless thing, for the general law being, as we think, valid and constitutional, the statutory incorporation under it was all that was needed. It perhaps was a safer, and certainly as safe, a charter as any that would be granted by a special law, while that general law was unrepealed. Counsel for the defendant in error cited us to the case of *Johnston v. Crawley*, 25 Ga. 316, which it was claimed holds that such acts are amendments to the charter, and not a new charter. We do not think that case should control our decision in this case, under the facts of the present case. Besides, from a reading of the facts of that case, it will be seen that it was not necessary to the decision of that case for the court to hold that these two charters were the same. The main issue in that case was, whether a claimant who had purchased property under judgments which were junior to a mortgage could hold the property against the mortgagee. Johnston bought the mill and machinery under judgments junior to Crawley's mortgage, and bought with notice that the judgments were junior to the mortgage. The mortgage was foreclosed, and was levied upon the mill and machinery, and a claim was interposed by Johnston. All that it was necessary to decide in that case was a very plain proposition of law,—that Johnston's title, arising from a sale under junior judgments, could not prevail over the older lien of the mortgage, whether the corporations were the same or different. We therefore do not think

that case should control us in our decision of this case, when it is manifest from the acts of the legislature themselves that they were intended to create a new corporation, and not to amend the charter obtained under the general law. For these reasons we reverse the judgment of the court below. Judgment reversed.

Subscription to Stock—Liability of Subscriber.—An alteration in the charter of a railroad by which the privilege of extending the road is conferred upon the company does not release a subscriber to the company's stock. *Cross v. Peach Bottom R. Co. (Pa.)*, 1 Am. & Eng. R. Cas. 366. But a material deviation in the intended route of the road will release him. *Moore v. Hanover, J. & S. R. Co. (Pa.)*, 4 Ib. 256. Proof that a railroad company has abandoned the construction of its line is sufficient to defeat an action to recover unpaid subscriptions to its stock; and it is for the jury to determine whether, under the evidence, the company has abandoned the construction. *Delaware Riv. & L. R. Co. v. Rowland (Pa.)*, 30 Ib. 524.

Same—When Subscriber is released from Liability.—See note, 4 Am. & Eng. R. Cas. 261.

BYWATERS *et al.*

v.

PARIS AND GREAT NORTHERN R. CO.

(*Texas Supreme Court, April 30, 1889.*)

Charter—Forfeiture—Failure to Commence Construction—Effect of Statute.—Art. 4378, Tex. Rev. Stat., which provides that "if any railway corporation organized under this title shall not, within two years after its articles of association have been filed and recorded, as provided by this title, begin the construction of its road, and construct, equip, and put in good running order at least ten miles of its proposed road," "such corporation shall . . . forfeit its corporate existence, and its power shall cease as far as relates to that portion of the road then unfinished, and shall be incapable of resumption by any subsequent act of incorporation," is self-acting, and a failure to commence work within two years of the filing and recording of the articles of association operates as a forfeiture of the charter without the necessity of any judicial action.

Same—Subscription to Stock—Enforcement—Revival of Obligation.—The Texas act of 1885, which provides "that all limitations as to the time within which any part of any railroad shall be constructed" "shall be suspended until January 1, 1887," cannot have the effect of authorizing a company, whose charter had been forfeited prior to its enactment by a failure to commence the construction of its road within the statutory period, to

maintain an action against a subscriber to its stock, such subscriber being presumed to have contracted with reference to the law in force at the date of his subscription, and the legislature being without power to revive an obligation which has lapsed.

APPEAL from District Court, Lamar County.

J. G. Dudley for appellants.

Hale & Baldwin for appellees.

ACKER, J.—On the 19th day of July, 1881, J. N. Adams subscribed for 20 shares, of \$100 each, of the capital stock of appellee company, and paid 5 per cent of his subscription in cash. On the 28th day of July, 1881, appellee, Case stated. having organized by the election of directors and officers, was duly incorporated under the general laws. The amount of capital stock was fixed by the charter at \$30,000, all of which was subscribed for, and 5 per cent paid in cash. The charter declared the purpose of the corporation to be “the construction of a railroad from Paris, Tex., to Red River.” On the 19th day of September, 1881, Adams died intestate, without children or descendants of children, leaving no separate estate but a large community estate which went into the possession of his widow, Emily F., who married J. K. Bywaters in December, 1882. Adams owed no debts other than the subscription sued on. Annual meetings were held and officers elected, but no other steps were taken towards carrying out the purposes of the charter until in February and March, 1886, when calls were made by the directors covering the unpaid 95 per cent of the stock, which appellants refused to pay, and for the recovery of which this suit was instituted on the 22d day of March, 1886. The trial was without a jury, and resulted in judgment against appellants for the amount sued for, with interest and costs of suit.

Of the several defences interposed by appellants, we think it necessary to consider one, which lies at the threshold of the case, and, in our opinion, is conclusive of the rights and liabilities of the parties. Article 4278 of the Revised Statutes, under which appellee obtained its charter, provides “if any railway corporation organized under this title shall not, within two years after its articles of association have been filed and recorded as provided by this title, begin the construction of its road, and construct, equip, and put in good running order at least ten miles of its proposed road, and if any such railroad corporation, after the first two years from the date of its organization, shall fail to construct, equip, and put in good running order at least twenty additional miles of its road each and every succeeding year until the entire completion of its line, such corporation shall, in either such cases, forfeit its corporate existence, and its powers shall

Statute effects
a forfeiture
without aid of
court of law.

cease as far as it relates to that portion of said road then unfinished, and shall be incapable of resumption by any subsequent act of incorporation." It is contended by appellants that the failure of appellee to begin the construction of its road within the two years after July 28, 1881, the day on which its articles of association were filed in the office of the secretary of state, worked a forfeiture *ipso facto* of its corporate existence, and determined its powers by virtue of this statute. Appellee contends that this statute is not self-acting; that there could be no forfeiture of its charter, except by judicial proceeding for that purpose; and that, if the statute is self-acting, and the failure to comply with its conditions did work a forfeiture of its charter, the act of 1885 condoned the forfeiture and restored its corporate existence. We think there can be no doubt that the statute is self-acting, and that appellee, having failed to begin the construction of its road within the two years, forfeited its corporate power to do any act not looking to the winding up of its business, and had no power to institute this suit, or perform any other act, in the absence of a showing that this was necessary to that end. The state had the right to prescribe the terms upon which appellee acquired its charter, and to attach to its grant of corporate power the conditions and limitations upon which its creation, the corporation, should continue to exist and exercise its corporate powers. The general railroad law of New York contains the following provision: If any corporation formed under the general act "shall not, within five years after its articles of association are filed and recorded in the office of the secretary of state, begin the construction of its road, and expend thereon ten per cent on the amount of its capital, or shall not finish its road and put it in operation in ten years from the time of filing its articles of association as aforesaid, its corporate existence and powers shall cease." In construing this statute (Act 1867, c. 775, § 1) the court of appeals of New York, *In re Brooklyn W. & N. R. Co.*, 72 N. Y. 248, says: "The existence of the corporation was determined by the omission to comply with either of the prescribed conditions, and the omission to begin the construction, and to expend the ten per cent of the capital within the five years, was as fatal as the failure to finish the road within the ten years. . . . It needed no action or judicial procedure to declare or complete the forfeiture of the charter and loss of corporate power." To the same effect are the following authorities: *Brooklyn S. T. Co. v. Brooklyn*, 78 N. Y. 530; *In re Brooklyn, W. & N. R. Co.*, 75 N. Y. 338; *In re Brooklyn, W. & N. R. Co.*, 81 N. Y. 71; *Oakland R. Co. v. Oakland B. & F. V. R. Co.*, 45 Cal. 365; *Farnsworth v. Minnesota & P. R. Co.*, 92 U. S. 66.

The act of 1885 (laws of that year, 54), upon which appellee

relies as an avenue of escape from the consequences of the foregoing conclusion, is as follows: "That all limitations as to the time within which any part of any railroad shall be constructed, contained in articles 605 and 4278 of the Revised Statutes, shall be suspended until January 1, 1887, and the period of time within which any part of any road shall be constructed, equipped, and put in good running order shall begin to run from said date." If correct in our conclusion just announced, appellee had forfeited its corporate existence, and its powers had ceased long before the act of 1885 took effect. Adams is presumed to have subscribed for the stock in contemplation of and with reference to the laws then in force, by the operation of which he was absolved from liability on his subscription before the act of 1885 became a law. We cannot assent to the proposition that the legislature has the power to make a contract for the parties, or to revive and make binding an obligation which has lapsed or become barred, without the consent of the party to be bound. Besides this, we think the concluding paragraph of article 4278 is conclusive against the construction of the act of 1885 contended for by appellee. This concluding paragraph provides that the corporate existence of a company which has been forfeited under the operation of the article "shall be incapable of resumption by any subsequent act of incorporation." To give the act of 1885 the construction contended for by appellee would be to nullify this provision, for by that construction the act of 1885 becomes an act of incorporation as to appellee.

Subsequent statute cannot revive lapsed obligation.

We are of opinion that the judgment of the court below should be reversed, and the judgment rendered here in favor of appellants; that appellee take nothing by its suit, and that it pay all costs.

STAYTON, C.J. Report of commission of appeals examined, their opinion adopted, the judgment reversed, and rendered for appellants.

Forfeitures Declared by Statute.—While a forfeiture at common law does not operate to divest the title of the owner until, by a proper judgment in a suit instituted for that purpose, the rights of the state have been established, it is otherwise when the forfeiture has been declared by a statute. *Oakland R. Co. v. Oakland B. & F. V. R. Co.*, 45 Cal. 365. It has accordingly been held that a statute which requires railroad companies organized under it to begin construction and expend thereon ten per cent of its capital within five years, and to finish its road and put it in operation within ten years, from the filing of its articles of association, and which declares that "its corporate existence and powers shall cease," works a forfeiture without the necessity of any judicial decision. *Matter of Brooklyn W. & N. R. Co.*, 72 N. Y. 245. If a franchise is granted to construct a street railroad within a certain time, and it is also provided that "if the provisions of this act are not complied with, then the franchises and

privileges herein granted shall utterly cease and be forfeited," a failure to lay the track within the prescribed time forfeits the franchise without the necessity of any suit for that purpose. *Oakland R. Co. v. Oakland B. & F. V. R. Co.*, 45 Cal. 365. A charter which provides that unless a company be organized, and one mile of its road constructed within a specified period, all powers, rights, and franchises "shall be deemed forfeited and determined," effects a forfeiture without the intervention of the court. *Brooklyn Steam Transit Co. v. City of Brooklyn*, 78 N. Y. 524.

In opposition to the foregoing cases, it has been *held*, that if the continuance of a charter beyond a fixed time is made dependent upon the performance of a specified condition, the non-performance of the condition is a mere ground of forfeiture, which can only be taken advantage of in *quo warranto* proceedings. *La Grange & M. R. Co. v. Rainey*, 7 Coldw. (Tenn.) 420. It has also been *held*, that a statute which provides that when a railroad company shall for one year suspend its lawful business it "shall be deemed to have forfeited the rights, privileges, and franchises" conferred upon it by the act of incorporation, does not operate a dissolution of the company without any judicial proceeding. *State v. Minnesota Cent. R. Co. (Minn.)*, 29 Am. & Eng. R. Cas. 440. And in *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358, it was held that a condition contained in a municipal ordinance consenting to the construction of a street railroad, that the road should be completed in a given time, was a condition subsequent; that the failure to complete the road did not *ipso facto* determine the grant; and that a judicial decision was necessary to deprive the grantee of the franchise.

In a proceeding by the attorney-general, it is mandatory upon the court to declare a forfeiture when the facts clearly bring the case within the provisions of a statute providing therefor. *State v. Minnesota Cent. R. Co. (Minn.)*, 29 Am. & Eng. R. Cas. 440.

When, by the franchise, it is required that work upon the railroad should be commenced within one year, but the nature and quantity of the work and the place at which it should be done are not specified, the question whether work was in fact commenced is a question of fact for the trial court. *Omnibus R. Co. v. Baldwin (Cal.)*, 1 Am. & Eng. R. Cas. 316.

Thirty-six years after the expiration of the time fixed for the completion of a railroad the plaintiff, in a possessory action to recover land over which the road has been constructed, cannot avail himself of the failure of the company to complete its railroad within the time required by its charter. *Cincinnati, H. & I. R. Co. v. Clifford (Ind.)*, 33 Am. & Eng. R. Cas. 81.

A corporation having no legal existence cannot take property under the right of eminent domain; and when, therefore, a company has forfeited its franchises by non-fulfilment of a condition of its charter, the fact may be pleaded by any one whose property is sought to be appropriated. *In re Brooklyn W. & N. R. Co.*, 72 N. Y. 245, 75 N. Y. 335.

GULF, COLORADO AND SANTA FÉ R. CO.

v.

NEWELL.

(Texas Supreme Court, March 19, 1889.)

Charter—Extinction—Sale under Execution—Liability of Purchaser—Agreement to Maintain Depot.—Art. 4260, Tex. Rev. Stat., which declares that in case of the sale of the road-bed and franchise of a railroad company under an execution, the purchasers "shall be entitled to, have, and exercise all the powers, privileges, and franchises granted to said company by its charter or by virtue of general laws," and "shall be deemed and taken to be the true owners of said charter and corporators under the same, invested with all the powers, rights, privileges, and benefits thereof in the same manner and to the same extent as if they were the original corporators of said company," does not have the effect of extinguishing the original railroad company, and the purchaser at an execution sale does not assume any liability for former indebtedness not secured by liens, and therefore is not liable under an agreement made by the original company to erect and maintain a depot at a certain place.

Same—Consolidation of Companies—Estoppel.—A company which has purchased at execution sale the property and franchises of another railroad company is not estopped by such purchase from denying the consolidation of the two companies, such purchaser being authorized to acquire the property and franchises without consolidation.

APPEAL from District Court, Montgomery County.

J. W. Terry for appellant.

W. P. McComb for appellee.

STAYTON, C.J.—Appellee brought this action against the Gulf, Colorado & Santa Fé R. Co. to recover damages for the breach of a contract which he alleges the Central & Montgomery R. Co. made with him and other residents of the town of Montgomery in the year 1879. He alleged that this contract was evidenced by a subscription list, the caption of which provided that, in consideration the subscribers would pay the sums each subscribed, the Central & Montgomery R. Co. would establish, build, and maintain permanently its depot at some point within 1000 yards of the courthouse, in the town of Montgomery, and that he subscribed and paid to the railway company the sum of \$1000. He further alleged that, in compliance with this contract, the Central &

Case stated—
Petition.

Montgomery R. Co., in the year 1879, did construct and maintain its depot within the named distance from the court-house, where it remained until about September, 1885, but that about the month of June, 1882, the Central & Montgomery R. Co. ceased to control and operate its railway, and to exercise its rights and franchises, which passed into the possession and control of appellant under some contract, pretended purchase, or by usurpation, and that since that date appellant has continuously managed and controlled the railroad property and franchises of the other railway company. He further alleged that about the month of September, 1885, appellant, in violation of the contract between himself and other citizens of the town of Montgomery and the Central & Montgomery R. Co., established a depot at a point more than 1000 yards from the court-house, in the town of Montgomery, where it has since transacted its business, abandoning the depot formerly established and used; that, after making the contract on which he sues, he bought property in the town of Montgomery, which has been greatly depreciated in value by the removal of the depot; and for damages thus sustained he brings this action, based on the contract before referred to. There is no averment that the two railway companies have been voluntarily or involuntarily consolidated or amalgamated, nor is there any averment from which this can be inferred, or from which it can be inferred that the Central & Montgomery R. Co. is not an existing corporation, clothed with all the rights, powers, and franchises it ever possessed.

Appellant filed demurrers to the petition, which were as follows: "(1) The defendant excepts to the plaintiff's petition, and

Demurrer. says that it appears therefrom that the Central & Montgomery R. Co. is a proper and necessary party defendant in this case, and this action ought not to proceed without said company is a party. (2) For further exception to said petition, defendant says that the same states no facts which show, or tend to show, that the defendant is liable on the contract or breach of contract alleged to have been made with the Central & Montgomery R. Co." These demurrers were overruled, and this ruling is assigned as error.

Appellant pleaded general denial, and by special answer alleged, in substance, that for a valuable consideration it purchased from George Sealy, who was the sole stockholder in the Central & Montgomery R. Co.,—all of its bonds having been paid off and destroyed,—the Central & Montgomery R., free from all debts, stock, bonds, or otherwise; that upon the faith of such purchase its officers took possession of the road, and operated the same under color thereof, until September 6, 1887; that it had no notice of appellee's contract, and never in any manner assumed the obligations of the

Defences.

Central & Montgomery R. Co.; that on September 6, 1887, it purchased at sheriff's sale, under a valid judgment, execution, and levy (which are particularly described), the entire road-bed, track, franchises, and charter of the Central & Montgomery R. Co., its right of way and depot grounds, being its entire line from Navasota to Montgomery, to all of which, on the same day, the sheriff executed and delivered to it a deed in due form of law; that all acts of its officers in the premises down to September 6, 1887, were *ultra vires*; and that on that day, by said purchase and sheriff's sale, it acquired the property free from all claims against the Central & Montgomery R. Co. which were not liens on the same prior to the said judgment. Demurrers to the special answer were sustained, and this ruling is assigned as error. These rulings present the main questions to be determined in the case.

If, giving to the petition the broadest intendments possible, under its averments, there could be doubt as to the true relation between the two railway companies, the answer would have left no ground for controversy as to this; and if, looking to the entire pleadings of both parties, admitting the averments of both to be true for the purposes of the demurrers, it appears that the plaintiff showed no right to maintain this action against appellant on the contract of the other railway company, then the judgment must be reversed. The relation of appellant to the Central & Montgomery R. Co., under the purchase from George Sealy, was considered in *Gulf, C. & S. F. R. Co. v. Morris*, 67 Tex. 696, 35 Am. & Eng. R. Cas. 94, wherein it was held that the title to the Central & Montgomery R. and its franchises did not pass to appellant through that transaction, and that its corporate existence continued. The purchase at sheriff's sale, set up in the answer, if it be conceded that appellant had power to buy, did not destroy the corporate existence of the Central & Montgomery R. Co., but vested in appellant the franchise and corporate property sold, freed from liability for existing debts not secured by prior liens, and from all obligations of that company strictly personal in character. The appellant, at most, became the owner of the corporate franchise of the Central & Montgomery R. Co., and of the property sold, just as would any individual who might have purchased at the sheriff's sale. Ownership alone does not operate a consolidation, for this cannot be made without the consent of the state, which will not be implied; nor can it be made without the consent of the stockholders of the companies to be consolidated. *Pearce v. Madison & I. R. Co.*, 21 How. (U. S.) 442; *State v. Bailey*, 16 Ind. 46; *Tuttle v. Michigan A. L. R. Co.*, 35 Mich. 247; *Mowrey v. Indianapolis & C. R. Co.*, 4 Biss. (U. S.) 78; *Shelbyville*

Purchase at
sheriff's sale
held not to de-
stroy corporate
existence of
execution
debtor.

& R. T. Co. v. Barnes, 42 Ind. 498; Bishop v. Brainerd, 28 Conn. 288; Tayl. Corp. § 419 *et seq.*; Mor. Priv. Corp. 544; 1 Ror. R. R. 588; Houston & T. C. R. Co. v. Shirley, 54 Tex. 125, 4 Am. & Eng. R. Cas. 443; Indianola R. Co. v. Fryer, 56 Tex. 609, 11 Am. & Eng. R. Cas. 324; Clinch v. Corporation, L. R. 4 Ch. 118; Dougan's Case, L. R. 8 Ch. 540. There being no consolidation alleged, it is unnecessary to consider whether or not, had there been, the consolidated company would be liable on the contract made the basis of this action.

The statute provides that, "in case of the sale of the entire road-bed, track, franchise, and chartered right of a railroad company, whether by virtue of an execution, order of sale, deed of trust, or any other power, the purchaser or purchasers at such sale, and their associates, shall be entitled to have and exercise all the powers, privileges, and franchises granted to said company by its charter, or by virtue of the general laws; and the said purchaser or purchasers and their associates shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges, and benefits thereof, in the same manner, and to the same extent, as if they were the original corporators of said company, and shall have power to construct, complete, equip, and work the road upon the same terms, and under the same conditions and restrictions, as are imposed by their charter and the general laws." Rev. St. art. 4260. By the sale made by the sheriff there was a change made in the ownership of the Central & Montgomery R. and of its franchise, but the corporate existence continues with franchise neither enlarged nor restricted as before. That railway company, in whomsoever may be its ownership, stands charged with any duty and obligation to the public imposed upon it by its charter and the nature of its business, and from those it cannot escape without legislative permission, so long as its corporate existence continues. If it leases its road, or otherwise permits it to be controlled and operated by another corporation, without lawful authority, it will remain liable for any breach of duty to the public, as fully as though its road was operated under the control of its own directory, while, at the same time, the same liability may exist on the part of the corporation operating its road. If its charter imposes upon it obligations and responsibilities continuous in their nature, in the discharge of which individuals, as distinguished from the public, have an interest, then such duties and obligations rest upon it in the hands of whomsoever may become the owner of its property and franchise, and such subsequent owner would be bound by any covenant running with the property purchased. A person or corporation, however, who acquires the property and franchise of a railway corporation through sale under execution,

takes it freed from all liability for its former indebtedness not secured by prior lien, and from all mere personal obligations assumed by the former owner.

That appellant is not liable on the contract made the basis of this action, under the averments of the pleadings, seems to us clear. The contract was one personal in its character, which could not fix any obligation whatever on appellant. *City of Menasha v. Milwaukee & N. R. Co.*, 52 Wis. 420, 5 Am. & Eng. R. Cas. 300; *Wright v. Milwaukee & St. P. R. Co.*, 25 Wis. 46; *Sappington v. Little Rock, M. R. & T. R. Co.*, 37 Ark. 23, 11 Am. & Eng. R. Cas. 330; *Tawas & B. C. R. Co. v. Judge*, 44 Mich. 479, 11 Am. & Eng. R. Cas. 584; *Hammond v. Port Royal & A. R. Co.*, 16 S. Car. 573. If the contract sued upon has not become binding on appellant, we do not see that its refusal to comply with it gives cause of action either on the contract or for tort against it; for there is no privity between them, nor duty raised by the contract.

It is urged that appellant is estopped to deny the fact of consolidation. We do not see on what ground an estoppel can be based. Appellant has done no act which in any manner influenced appellee to make the contract on which he relies, believing that it was bound to execute it. It claims, at most, to be the owner of the railway and franchise of the corporation known as the "Central & Montgomery R. Co.," and by virtue of such ownership claims the right to operate and control that property and franchise, which, if it be such owner, it may lawfully do without consolidation, and cannot lawfully do as a consolidated corporation, under the averments of the petition.

Plaintiff not
estopped to
deny consol-
idation.

It is unnecessary to inquire whether appellee, under the contract alleged, has cause of action against the representatives of the interests of those interested in the assets of the sold-out company. The demurrer to the petition should have been sustained, and the demurrers to the answer should have been overruled, and for the errors in the ruling of the court below in these respects the judgment will be reversed, and the cause remanded.

CHICAGO AND ALTON R. CO.

v.

SUFFERN *et al.**(Illinois Supreme Court, June 15, 1889)*

Side Tracks and Switches—Obligation to Connect—Mandamus—Illinois Constitution.—The provision of the Illinois Constitution that "all railroad companies shall permit connections to be made with their track so that . . . any public warehouse, coal-bank, or coal-yard may be reached by the cars of said railroad" is absolute and peremptory; and if a railroad company wrongfully removes the connection of a switch leading to a coal-bank, the legal obligation of the company to restore such connection may be enforced by *mandamus*.

Same—Disconnecting—Switch Connecting with Rival Line.—The fact that the proprietor of a coal-mine, which already had a switch connecting with a railroad, had permitted another company to construct a switch on its road to the coal-bank, and that the two switches were connected at the weighing-scales, does not, in the absence of evidence tending to show that the cars of the second company were pushed from the weighing-scales upon the line of the first company, or that the first company was in any way injured by the construction of the second switch, justify the first company in disconnecting its switch.

Same—Discretion of Manager—Pleading—Sufficiency of Averments.—In an action for *mandamus* to compel the restoration of a switch leading to a coal-mine, a plea which alleges that the manager of the respondent, in the exercise of his discretion, determined that the use of the connecting-switches was unsafe and imprudent, is insufficient if it fails to set up facts showing wherein the use would be unsafe.

Same—Disconnecting Switch—Doing Business with Rival Company.—One railroad company is not justified in disconnecting a switch leading to a coal-mine, and refusing to permit the owners of the coal-mine to ship coal over its road because such owners also ship coal from the same mine over the road of another railroad company which is also connected with the mine by a switch.

SHOPE, C. J., WILKIN and CRAIG, JJ., dissenting.

ERROR to Appellate Court, First District.

Brown & Kirby for plaintiff in error.

John M. Hamilton (*Charles C. Gilbert, Jr.*, of counsel) for defendants in error.

MAGRUDER, J.—This is a petition for a *mandamus*, filed by Suffern Bros., the defendants in error, against the Chicago & Alton R. Co., the plaintiff in error, to compel the company to restore a switch or side-track connection between its main track and the coal-mine of Suffern Bros., and

Facts.

to furnish cars for the transportation of coal from the mine. The circuit court awarded the writ, and its judgment has been affirmed by the appellate court, from which the case is brought here by writ of error.

The coal-mine is situated a short distance west of the right of way of the company, which at this point is 100 feet wide, and runs from the northeast to the southwest. The side track was built in 1879, under a contract then made between the company and Suffern Bros. The cost of it was paid by Suffern Bros., at the rate of \$1 per foot, amounting to \$793. It was constructed with the consent of the company, and under the supervision of the company's servants. It is partly upon the railroad right of way, and partly upon the land of the defendants in error. It starts from the main track at a point northeast of the coal-mine, and connects again with the track at a point southwest of the mine, diverging to the westward in its course between these two points so as to pass over the land of the relators near the coal-bank and under the coal-shoot attached to their mine. The plaintiff in error furnished them with cars, and hauled coal for them from their coal-shaft over this switch to various places on the main line, to which shipments were made for eight years, from 1880 to 1887, inclusive. On September 10, 1887, plaintiff in error, the respondent in the court below, severed the connection between the switch and the main track by taking out the frogs and connections at both ends of the side track, and has ever since refused to restore such connection, or to furnish cars, although called upon by the relators to do so.

Section 4, art. 13, of the constitution of this state provides as follows: "And all railroad companies shall permit connections to be made with their track, so that any such consignee [of grain], and any public warehouse, coal-bank, or coal-yard may be reached by the cars on said railroad." If the respondent had no right or authority to remove the connection, it can be compelled by *mandamus* to restore it under the constitutional provision thus quoted. Two rules in regard to the issuance of a writ of *mandamus* are well settled by all the authorities upon the subject: First. The party applying for it must show a clear legal right to have the thing which is asked for done. Second. It must be the clear legal duty, of the party sought to be coerced, to do the thing he is called upon to do. *Commissioners of Highways v. People*, 66 Ill. 339; *People v. Chicago & A. R. Co.*, 55 Ill. 95. The constitution says that the respondent "shall permit" its track to be connected with the coal-bank, so that the latter may be reached by the cars on its road. The command to it to permit such connection is absolute and imperative. Its legal duty in the premises is so plain that it cannot be questioned. In 1879, and

Constitutional provision relative to side tracks.

for eight years thereafter, it performed its duty by allowing the switch to be connected with its main track, and to be used by the relators in shipping coal from their mine. If in 1887 it cut the switch loose from its track without right or authority, it thereby refused any longer to grant a permission which the constitution commanded it to grant, and was guilty of the violation of a public duty which the organic law of the state expressly imposed upon it. That *mandamus* will lie in such a case, there can be no question. When the side track was first laid, the

**Mandamus
lies to compel
restoration of
side track.**

respondent may have had the right to say how it should be laid. It may have then been vested with such discretionary power as that it was authorized to direct in what particular manner the connection should be made with its main track; but its discretion in this regard was exhausted after the completion of the switch, and its use without objection for a number of years. In the late case of *People v. Louisville & N. R. Co.*, 120 Ill. 48, we awarded a *mandamus* to compel a railroad company to stop its trains at a depot in McLeansboro. It was there held that the fixing of the terminal point of its road in a town or city was within the discretion of the railway company, but that the location, when once fixed, could not afterwards be changed by the company, and that its discretion in the matter had been fully and finally exercised when it erected a depot in the town, built tracks to it, and stopped its trains there for nearly 13 years.

The legal right of the relators to have the connection of the switch restored, if it was wrongfully removed, follows as a necessary corollary from the legal obligation of the respondent to make such restoration. When the constitution enjoins it as a duty upon the railroad company to permit a connection between its tracks and any coal-mine, it impliedly confers upon the owner of such coal-mine the right to call upon the company to grant such permission, and to continue it when once granted. The doctrine in this country is that a private person may apply for a *mandamus* to enforce a public duty, not due to the government as such, without the intervention of the government law officer. *County of Pike v. State*, 11 Ill. 202; *City of Ottawa v. People*, 48 Ill. 233; *Union Pac. R. Co. v. Hall*, 91 U. S. 343.

The question next to be considered is, by what right or authority respondent has assumed to disconnect from its track the switch running to the mine of the relators, and to deprive them thereby of all facilities for shipping coal in its cars and over its road. The Chicago, Santa Fé & California R. Co. runs west of the coal-mine, and its right of way is nearly parallel with that of plaintiff in error. About September 1, 1887, the Santa Fé R. Co. constructed a switch from its main track to

**Permitting
construction
of side track
by rival com-
pany does not
justify sever-
ing of connec-
tion.**

the mine of the relators, and received some shipments of coal over its line from the coal-mine by means of such switch. This new connection between the mine and the Santa Fé road has given rise to all the trouble between the relators and the respondent. The pleadings are voluminous and complicated. The respondent answered the petition. The relators filed replications to the answer. The respondent filed two rejoinders to the replications. The relators demurred to the rejoinders. The trial court sustained the demurrer, and, the plaintiff in error electing to stand by its rejoinders, a judgment was rendered awarding a writ.

We do not deem it necessary to pass upon the various objections made by each party to the pleadings of the other, or to determine the comparative merits of the pleadings upon both sides. It will be sufficient to refer to such statements therein as we consider material to the decision of the case. The relators aver that the Santa Fé switch does not cross or interfere with the main track of the respondent, or with the switch built from respondent's track to the mine, except that in connecting with both roads empty coal-cars from the separate switch of each railroad are pushed by hand by the servants of relators upon the track on the weighing-scales near the coal-bank, under the coal-shoot attached to the mine, and, after being loaded and weighed, are pushed off said scales by hand, and delivered upon the separate switches of the two railroads away from and without interference with each other; and relators further aver that this was the practice when respondent's switch was the only one connected with the mine, and that neither company runs, or is permitted to run, its engines or cars over said scales, or over the switch of the other company, but that the cars at that point are and always have been handled by hand. The respondent avers that the relators permitted the Santa Fé company, without the consent of respondent, to connect with and jointly use, upon the property of the relators, the switch built from respondent's road, whereby the Santa Fé company "would be enabled to transfer its cars over the said switch to and upon the main tracks of defendant," and that, in the judgment of respondent's general manager, such joint use would not be safe or prudent, "wherefore defendant did remove the frogs," etc. The respondent admits in its pleadings that the only point where the two switches connect is upon the land of the relators, and not upon its own right of way. Under our practice the answer or plea to the petition for *mandamus* takes the place of the return to the alternative writ. The respondent must deny the facts alleged in the petition on which the claim of the relator is founded, or set up other facts sufficient in law to defeat such claim, stating these facts positively and distinctly. Mos. Mand. 210. Every

intendment is made against returns which do not answer the important facts. *People v. Kilduff*, 15 Ill. 492; *People v. Ohio Grove Tp.*, 51 Ill. 191. Nowhere in its pleadings does the respondent deny that the only point where the two switches were joined was in the track upon the weighing-scales, near the coal-bank, under the coal-shoot, or that cars were shoved upon and off the scales from and to the respective switches by hand, and not otherwise. These allegations in the pleadings of the relators must therefore be assumed to be true. It is difficult to understand how such a joint use as is here described of a common track upon the weighing-scales of the relators for the purpose of loading cars with coal, and then pushing them by hand upon the respective switches of the two roads, could in any way injure the plaintiff in error, or justify its severance of the connection with its track. There was no danger to the servants or property of the respondent. The cars were shoved upon and from the scales by the servants of the relators. It is not sufficient to aver that the Santa Fé cars might be shoved upon respondent's track. It is not alleged that the Santa Fé cars were ever pushed upon its main track, or upon its right of way, or upon the switch leading to its track, except at the common point of juncture above indicated.

Counsel for plaintiff in error says that its manager, in the exercise of his discretion, determined that such joint use and occupation as are above mentioned were unsafe and imprudent, and for that reason that it had a right to disconnect the side track, and that it cannot be compelled by *mandamus* to do what depends upon the exercise of discretion. It is necessary to go further than to state that the manager thought the joint use to be unsafe. Facts must be set up showing wherein such use was unsafe. No such facts are averred. What the plaintiff in error is called upon to do is to permit a connection between its track and the coal-mine. It has no discretion in the performance of this duty. By the command of the constitution it must permit the connection. If the owner of the mine makes an improper use of the switch or side track, so as to injure plaintiff in error in any way, the courts will furnish it a remedy for the wrong suffered; but it has no right to take the law into its own hands, and refuse to do what the constitution requires it to do. The Santa Fé R. Co. is also obliged to permit its track to be connected with the mine of the relator. If there were several other railroads passing near the mine, the same constitutional obligation would rest upon each. Under such circumstances a common track, to be used by all the roads for receiving coal into their cars, would become a necessity. The owner of the mine would not be compelled to have a separate coal-shoot or a separate entrance to his

Discretion of
manager—
Joint use un-
safe and im-
prudent.

mine for the switch of each railroad company. We have held in a number of cases that a railroad company is bound to deliver grain at any elevator or warehouse to which such grain may be consigned along the line of its road, or connected with its main track by a side track which it had permitted to be laid down. *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33; *People v. Chicago & A. R. Co.*, 55 Ill. 95; *Chicago & N. W. R. Co. v. People*, 56 Ill. 365; *Hoyt v. Chicago, B. & Q. R. Co.*, 93 Ill. 601. Switches branching off from the main tracks of a number of roads frequently connect with one or two tracks under the archway of an elevator, where grain is loaded into or unloaded from the cars of all the roads. Such common tracks are used by all the companies delivering or receiving grain at the elevator. Would one of these companies be justified in disconnecting the switch running from its track because the owner of the elevator permitted some other company to use the common track under the archway? As plaintiff in error permitted the side track to be built connecting its main track with the mine, and has continued for years to furnish cars to haul coal from the mine over its line, such side track must be considered as a part of its line (*Vincent v. Chicago & A. R. Co.*, *supra*); and it has been held that a railroad company can be compelled by *mandamus* to operate its road as a continuous line, and to replace a part of its track which it has wrongfully taken up (*Ohio & M. R. Co. v. People*, 120 Ill. 200; 30 Am. & Eng. R. Cas. 509, and cases there cited).

The petition in this case avers that respondent informed the relators that it severed the connection because relators had made use of the Santa Fé switch for the shipment of their coal, and that respondent notified the relators that it would refuse to receive coal from their mine for shipment if relators continued to avail themselves of the facilities of the Santa Fé road for the transportation of coal. This averment is not specifically traversed in the answer. Tapping, in his work on *Mandamus* (margin, p. 349), says: "Every distinct and material allegation contained in the writ must, if it be intended to contradict them, be traversed; as such of the material suggestions and allegations of the writ which are not denied or traversed by the return are, in contemplation of law, admitted by the defendant to be true." Even if it can be truthfully said that there are general words of denial in the answer which are sufficient to negative the last-mentioned averment, it otherwise appears from the pleadings that such averment suggests the real reason for the severance of the side track. The respondent alleges in its answer that the relators can take all the coal from their mine by means of the Santa Fé switch, and that, since they have acquired the means of shipping coal over the Santa Fé road, they have abandoned

Shipment of coal over rival line does not justify disconnection.

the shipment of coal upon respondent's line. The fact that the relators had acquired the means of shipping coal over the Santa Fé road by means of a new switch connection therewith is thus admitted by the answer to be the cause of the alleged abandonment of shipments over the respondent's road. But it clearly appears that the abandonment of such shipments was not voluntary, but forced. Respondent compelled the relators to abandon its line, because it took up the frogs and disconnected the side track. The allegations in the pleadings of the relators that when the switch was severed, they were shipping about 125 car-loads of coal per month over the Chicago & Alton road, and had contracts at that time for the delivery of coal to persons along the line of that road, and were unable to comply with their contracts by reason of such severance, and up to that time had only shipped three car-loads of coal over the Santa Fé road, and were only obliged to abandon their shipments over respondent's road because of the respondent's act in severing the side track from the main track, are nowhere traversed either by a general or special denial. It follows that, according to the respondent's own averments, it removed the connection with the mine of the relators because the relators chose to make some shipments of coal over the Santa Fé line. In this view the conduct of the plaintiff in error is wholly inexcusable.

One railroad company is not justified in refusing to permit the owners of a coal mine to ship coal over its road because such owners also ship coal from the same mine over the road of another railroad company. It is the duty of a railroad company to carry any freight that is offered, provided its legal charges for such carriage are paid. It cannot take the position that it will not carry coal from a mine upon the line of its road unless it is allowed to carry all the coal from such mine. It is for the interest of the public that there should be full and fair competition between the different railroad companies operating their lines in the state. Serious injury will result to the business interests of the country if shippers can be compelled by arbitrary measures to patronize one railroad to the exclusion of all others. No monopolies would be more odious than those which would result from the adoption of such a policy.

It is admitted that a side track connects the main track of plaintiff in error with the coal-mine of the Streator & Wilmington Star Coal Co., which is situated a short distance northwest of the mine of the defendants in error, and that plaintiff in error furnishes cars to said Star Coal Co., and hauls coal for it from its mine. Thus one coal-mine is aided in the prosecution of its business, while another is forced to suffer loss for want of the necessary means of transportation. In *Vincent v. Chicago & A. R. Co.*, *supra*,

**Discrimina-
between ship-
pers.**

and *Chicago & N. W. R. Co. v. People*, *supra*, certain railroad companies claimed the right to deliver all the grain transported over their lines to particular elevators in the city of Chicago which they favored, and to refuse to deliver any grain to other elevators which they did not favor. In the *Vincent Case* we said: The "evident object [of the legislature] was to prevent the growth of those injurious monopolies in the grain trade which would almost necessarily spring from the toleration of such a practice as that which these appellants seek to enjoin. To do this, it was necessary to secure to every warehouseman, whose warehouse was connected by a side track with a railway, the right to a delivery of all grain consigned to him. . . . It [the railroad company] must deal fairly by the public, and this it would not be doing if allowed so to discriminate as to build up the business of one person to the injury of another in the same trade." In the *Chicago & N. W. R. Co. Case*, after stating that contracts with railroad companies to deliver all the grain hauled by them to particular warehouses, or all the lumber hauled by them to particular lumber-yards, etc., would enable such companies to "subject the business of the state almost wholly to their control, as a means of their own emolument," we said: "How injurious to the public would be the creation of such a system of organized monopolies in the most important articles of commerce, claiming existence under a perpetual charter from the state, and, by the sacredness of such charter, claiming also to set the legislative will itself at defiance, it is hardly worth while to speculate. It would be difficult to exaggerate the evil of which such a system would be the cause, when fully developed, and managed by unscrupulous hands. . . . The principle that a railroad company can make no injurious or arbitrary discrimination between individuals in its dealings with the public, not only commends itself to our reason and sense of justice, but is sustained by adjudged cases." The language thus quoted applies to the case in hand. It was the evident design of the constitutional provision above quoted to compel the railroads to furnish the coal-mines in the state with all necessary facilities for the shipment and transportation of coal. As the railroad companies must deliver grain to all elevators upon the lines of their roads, or connected therewith by side tracks, so also must they receive shipments of coal from all coal-mines on the lines of their roads, or connected therewith by side tracks. The *mandamus* was properly issued. The judgment of the appellate court is affirmed.

SHOPE, C. J., and WILKIN, J., dissent.

CRAIG, J. (*dissenting*).—As I do not agree with the majority

of the court in the decision of this case, I have thought it proper to state my views: This was a petition for *mandamus*. Case stated. brought by appellees, who operate a coal-mine in Grundy county, to compel the Chicago & Alton R. to restore a certain switch connection between its main track and appellees' coal-shaft, and also to compel the railroad company to furnish cars on the switch for the use of appellees in the shipment of their coal. No evidence was introduced in this case. All the questions involved arose on the pleadings. It appears from the pleadings that the side track or switch was constructed in 1879 by the railroad company from its main track to appellees' coal-mine, partly on the right of way of the company, and partly on land of appellees which joins the right of way. Appellees paid on account of the construction of the switch \$793. From the time the switch was constructed until the month of September, 1887, the switch was used solely by the railroad company, the company placing empty cars upon it which appellees would fill with coal, and then the company would transport the coal over its line of road to its proper destination. In September, 1887, the Chicago, Santa Fé & California R. Co., at the instance and request of appellees, built a side track from its main line into the switch, which of course gave it the joint use of the switch which the Alton road had constructed. When the Alton R. Co. learned the fact, it removed the frogs which connected the main track with the switch, and thus the connection between the main line and coal-mine was broken, and this action was brought to restore the connection as stated before.

The railroad company put in an answer to the petition in which some of the facts alleged were admitted and others denied. Among other things, the answer contained the following: Respondent admits that about the 1st of September the Chicago, Santa Fé & California R. Co. constructed a switch to said coal-mine, and respondent avers that it did so by the procurement and consent of petitioners, and petitioners, without the knowledge and consent of respondent, connected said switch of said Chicago, Santa Fé & California R. Co. with the switch leading to the main track of this respondent, so that the cars of the said Chicago, Santa Fé & California R. Co. might be pushed onto the right of way and main track of respondent, without its knowledge or consent, and respondent hereupon declined to permit such connection with its main track to remain, and in the exercise of its judgment and discretion as to the safety and good policy of such connection, determined that it was unwise, unsafe, and improper for it longer to permit the switch, so out of its control, to connect with its main track, and believing that such connection might in some way become dangerous to the lives and limbs of its passengers and employees, and dangerous

to its property, it did disconnect its main track from such side track by the removal of the frogs on its right of way, as was its duty and right to do. To the answer the petitioner filed seven replications. No. 6 contains the following: Sixth. Defendant ought not to be precluded by reason of the allegation in said answer contained that about the 1st of September, 1887, the Chicago, Santa Fé & California R. Co. constructed a switch to said coal-mine, and that it did so by and with the procurement and consent of petitioners, and that petitioners, without the knowledge and consent of defendant, connected said switch of the Chicago, Santa Fé & California R. Co. with the switch leading to the main track of defendant, without its knowledge or consent, and the defendant thereupon declined to permit such connection with its main track, and, in the exercise of its judgment as to the safety and good policy of such connection, it determined that it was unwise, unsafe, and improper for it longer to permit the switch, so out of its control, to connect with its main track, etc., because they say they have the constitutional right to have their said coal-bank connected with both of said railroads, so that it can be reached by cars thereon, and that in making such connection the switches of defendant's road do not in any wise connect or interfere with each other, except that it is so arranged that empty coal-cars from the separate switch of each railroad may be and are pushed by hand by petitioners, their agents and servants, upon the track on the weighing scales near petitioners' coal-bank, under the coal-shoot attached to said mine, and are loaded and weighed by petitioners, and are by hand pushed off said scale, and delivered upon the separate switches of said two railroads, away from, and without any interference with, each other, and the manner of loading and delivering said cars with both the railroads, as aforesaid, is the same in practice as it has always been when the switch of the defendant was alone connected with petitioners' mine. To the replications the defendant filed two rejoinders, to which petitioners demurred. The court sustained the demurrer, and, as the defendant elected to abide by the rejoinders, judgment was entered as prayed for in the petition.

It is first claimed that the rejoinders were good, and that the court erred in sustaining the demurrer to them. It is also insisted that, if the rejoinders were not good, then the demurrer ought to have been carried back and sustained to the replications. It will therefore be necessary to consider the replications; but in the view we take of the record it will only be necessary to consider replication numbered six, as the real point in controversy arises under the facts alleged therein. The last clause of section 5, art. 13, of the constitution of the State of Illinois (1870), pro-

Duty of company to permit connecting of side track.

vides as follows: "And all railroad companies shall permit connections to be made with their track, so that any such consignee and any public warehouse, coal-bank, or coal-yard may be reached by the cars on said railroad." Paragraph 84, § 22, c. 114, Starr & C. St., provides: "Every railroad corporation in the state shall furnish, start, and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or be offered for transportation at the several stations on its railroads, and at the junctions of other railroads, and at such stopping-places as may be established for receiving and discharging way passengers and freights; and shall take, receive, transport, and discharge such passengers and property, at, from, and to such stations, junctions, and 'places,' on and from all trains advertised to stop at the same for passengers and freight respectively, upon the due payment, or tender of payment, of tolls, freight, or fare legally authorized therefore, if payment shall be demanded," etc.

Appellees, in the argument, predicate their right to relief on the above provision of the constitution and statute. I think it is plain from the language of the constitution that a railroad company may be required by the owner of a coal-mine to permit a connection with its track by switch or side track at a proper place, in order that the mine may be reached by rail, and the coal may be transported by car. Indeed the original arrangement set out in the pleadings under which the side track was constructed, and the connection with the main track made, and under which the side track was operated for eight years by the constant delivery of cars and shipment of coal, was but a compliance on the part of the defendant with the mandate of the constitution. But the question here involved is not whether appellees, who own a mine adjacent to the track of the railroad company, have the right to require the company to permit a connection between the coal-mine and the railroad track by a side track or switch. That right, in the argument, as we understand it, is not disputed. But the question here is whether the company may be required to restore a switch connection which will confer the power on another railroad company to not only use the switch of the defendant, but will also enable the other company to run its cars, if it saw proper, on the main track of the defendant. When this switch or side track was constructed by the Chicago & Alton R. Co. no other company had any connection with it. Thus matters remained until September, 1887, when, without the knowledge or consent of the defendant, appellees procured the Santa Fé R. Co. to connect a switch it had constructed to the mine with the switch of defendant, and now appellees claim that the defendant should be compelled

Obligation to permit connection which will allow rival company to transfer cars.

to restore a switch connection which will, in effect, allow the Santa Fé R. Co. to use defendants' tracks without its consent, and without making any compensation for the right. Section 20, c. 114, Rev. St. 1874, authorizes a railroad company organized under the act to cross, intersect, join, and unite its railway with any other railway before constructed, at any point on its route, and upon the grounds of such other railway company, with the necessary turnouts, sidings, and switches, and other conveniences, in furtherance of the objects of its connections. Under this section it may be conceded that the Santa Fé R. Co. might join or intersect defendant's side track, if the public necessity required it to do so. But this could not be done without making compensation, as the act expressly provides. If the two companies cannot agree upon the amount of compensation to be made, or the points and manner of such crossing and connection, the same shall be ascertained and determined in manner prescribed by law. Has the Santa Fé R. Co. the right to intersect the track of defendant, and thus acquire the right to use its side track or switches without making compensation? The statute declares otherwise, and yet, if appellees can compel the defendant to restore the connection, which they are seeking to do, the Santa Fé R. Co. will be at liberty to use defendant's tracks without making compensation, in direct violation of the statute.

It may be true, as set up in relator's sixth replication, that they have the constitutional right to have their coal-bank connected with both railroads; but the two railroad companies are under no obligation to use the same switch or side track in connecting their respective roads with the mine; and the relators have no constitutional or other power to compel the defendant corporation to consent to the use of its side track by another railroad company, until such company has obtained the right in the mode prescribed by law. We do not think the facts set up in the sixth replication was a defence to the matters alleged in the defendant's answer, and the demurrer interposed to the rejoinder ought to have been carried back to the sixth replication.

As to the right of relators to have a switch connection connecting their coal-mine with the railroad track of the defendant, and as to their right to be supplied with cars to transport their coal, I entertain no doubt whatever, and in a proper case they would be entitled to a *mandamus*; but, as I understand this record, it is not a controversy between the relators and the defendant, the Chicago & Alton R. Co., but the real controversy is between the two railroad companies, and the effect of granting relief to relators will be to allow the Santa Fé R. Co. to use the switch of the Alton road without paying for such use. As said before, the relators procured the Santa Fé Co. to connect its

track with the switch of the Alton Co. This they had no right to do until compensation was made for the right, and, in my judgment, before the defendant should be compelled to restore the switch connection, relators should be required to disconnect the Santa Fé switch from defendant's switch, and leave the two companies to adjust their rights as provided by law, before the one shall connect with the other.

HODGE

v

STATE.

(Georgia Supreme Court, March 23, 1889.)

Wrecking Train—Railroad Belonging to Private Corporation—Statute.—The Georgia act of October 12, 1885, making it penal to wreck railroad trains, etc., applies to all railroads, whether duly chartered as such or not.

Same—Conviction—Sufficiency of Evidence.—On the trial of an indictment for wrecking a train, it appeared that the wreck was caused by a slab of timber placed on the track. Two witnesses testified to the voluntary confessions by the defendant, who had been employed by the company and had been discharged. He had made threats. He lived near the place of the wreck and was seen near the place that morning. Defendant offered no testimony, but made a statement denying the confessions and threats, or knowledge of the crime. *Held*, that the evidence was sufficient to sustain a verdict of guilty.

ERROR from Superior Court, Dodge County.

Hodge was indicted for wrecking a train. The testimony tended to show that the train and track belonged to a private corporation, and was used for hauling lumber and hands. The wreck was caused by a slab of timber on the track. Several hands were injured. Two piles of such slabs were in the vicinity of the wreck. Two witnesses (one a detective) testified to voluntary confessions by defendant. Defendant had been employed by the company, and had been discharged. He had made threats. He lived near the place of the wreck, and was seen near the place that morning. Defendant offered no testimony, but made a statement denying confession and threats and knowledge of the crime. He was found guilty, and moved for a new trial on the following grounds:—(1) and (2) Verdict contrary to law, evidence, etc.: (3) Error in charging that it is not necessary that it should be shown that this is the railroad train

of a chartered corporation, nor of a strictly railroad company. Motion overruled, and defendant excepted.

L. A. Hall for plaintiff in error.

Tom Eason, Sol. Gen., by *J. H. Martin*, for the state.

BLECKLEY, C.J.—1. Hodge having been tried and convicted for wrecking a railroad train, and the court having denied him a new trial, the first question is whether the act of October 12, 1885, applies to a railroad not chartered. We think the act is applicable to any railroad whatsoever, and that the question of whether it has been chartered or not could not properly be raised. This was a railroad *de facto*, whether one *de jure* or not. The language of the act, neither in its title nor its body, suggests any restrictions whatever to railroads of any given class or kind.

Statute applies to any railroad.

2. The next question is whether the evidence in the record warrants the verdict. We agree with the court below in thinking it quite sufficient. For the facts in full, see the official report, and for the statute see Acts 1884-85, p. 131. Judgment affirmed.

Evidence sustains verdict.

Attempting to Wreck Railroad Train by placing an obstruction on the track is punishable under a statute directed against obstructing any engine or cars, although no engine or car is actually obstructed. *State v. Kilty* (Minn.), 9 Am. & Eng. R. Cas. 153.

ZAMBRINO

v.

GALVESTON, HARRISBURG AND SAN ANTONIO R. CO.

(*U. S. Circuit Court, W. D. Texas, March 19, 1889.*)

Jurisdiction—Federal Circuit Courts—Inhabitancy of District.—When the line of a railroad company extends into and through a federal judicial district, and it has local agents there who transact its ordinary corporate business, and it may be sued there under the laws of the state, it is an inhabitant of the district within the meaning of the provision of the act of congress of March 3, 1887, that no civil suit shall be brought before a circuit or district court against any person "in any other district than that whereof he is an inhabitant," notwithstanding the fact that it has its principal office in a neighboring district.

ACTION at law. On exceptions to plea in abatement.

A. G. Wilcox, *W. B. Sloan*, and *McGinnis & McGinnis* for plaintiff.

Davis, *Beall & Kemp* for defendant.

MAXEY, J.—This suit was instituted by Pablo Zambrino against the Galveston, Harrisburg & San Antonio R. Co. to recover damages resulting from personal injuries received by Zambrino in El Paso county, while employed as a laborer upon a construction train of the railway company, which was at the time engaged in the work of repairing the road. Plaintiff is a citizen of the state of Chihuahua in the republic of Mexico, and the defendant is a corporation created by special acts of the legislature of this state. Sp. Laws Tex. 1870, p. 45 *et seq.*; Sp. Laws 1850, p. 194 *et seq.* A plea in abatement is filed by the defendant, in which is asserted its immunity from suit within this judicial district, and to this plea exceptions are interposed by the plaintiff.

Several points have been raised in argument, mainly technical in their character, which, at the request of the parties, will not be considered, and the sole question to be determined may be thus stated: Is the defendant suable in the circuit court of the United States within the western judicial district of Texas? It is averred in the plea that the domicile and principal office of defendant is located at the city of Houston, which is within the eastern judicial district. The pertinent facts bearing upon the issue presented are agreed upon by the parties, and will be regarded as incorporated into the plea, and thus considered by the court in connection with the question of law to be decided. They are as follows: The plaintiff is a citizen of Mexico, and his cause of action arose in El Paso county, Tex. The defendant is a domestic railway corporation, having its principal office at the city of Houston within the eastern judicial district, and a railway line extending from the city of Houston through the western judicial district into the city of El Paso. At the latter place, and at other stations along the line of its road, the defendant has agents and servants through whom its usual and ordinary business of a railway common carrier is transacted, and upon whom process may be served under the laws of Texas. The act of congress, approved March 3, 1887, regulating the jurisdiction of the circuit courts, provides: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, . . . in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclu-

sive of interest and costs, the sum or value aforesaid. . . . But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 24 St. at large, 552, 553. See also 25 U. S. St. (1887-1888) pp. 433, 434.

Excepting cases where jurisdiction is founded only on the fact that the action is between citizens of different states, suit must, in pursuance of the act of 1887, be brought in the district of which the defendant is an inhabitant. Such was not the law as it aforesaid existed in the act of March 3, 1875, and prior judiciary acts. The corresponding provision of the act of March 3, 1875, reads as follows: "And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding." 18 St. at Large, 470; Desty, Fed. Proc. (6th ed.) p. 131, § 629a.

The act of 1875, in this particular, was a substantial re-enactment of the act of 1789 (Rev. St. § 739). *Ex parte Schollenberger*, 96 U. S. 375. It will thus be seen that an important clause of the act of 1875 is left out of the act of 1887, to wit: "Or in which he shall be found at the time of serving such process or commencing such proceeding." It follows that, if the defendant be suable in this district, such result springs only from the fact of local inhabitancy.

Before discussing the question as to whether a domestic railway corporation can be an inhabitant of any district other than that in which its principal office is located, it may be well to inquire into the general question of jurisdiction, proper, of this court, affecting corporations, as distinguished from the mere place of suability; for it is well understood that the general jurisdiction of the courts is not affected by an act of congress prescribing the place where a person may be sued. The latter is in the nature of a personal privilege or exemption in favor of a defendant, and may, or may not, be waived, at his election. "If," say the supreme court, "the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases." *Ex parte Schollenberger*, 96 U. S. 378; *United States v. American Bell Tel. Co.*, 29 Fed. Rep. 35; *Fales v. Chicago, M. & St. P. R. Co.*, 32 Fed. Rep. 676.

The act, regulating the jurisdiction of circuit courts, provides, that they shall have original cognizance of civil suits in which

Jurisdiction of corporations.

there shall be "a controversy between citizens of a state and foreign states, citizens, or subjects." Of the jurisdiction in this case, both as to subject-matter and the parties, there can be no doubt. As to subject-matter, suit is brought to recover damages in an amount exceeding \$2000. As effecting the parties, the plaintiff is a citizen of a foreign state, and the defendant is a Texas corporation. Whatever doubts may have been formerly expressed by the courts, touching the citizenship of corporations for jurisdictional purposes (*Strawbridge v. Curtiss*, 3 Cranch (U. S.), 267; *Bank v. Deveaux*, 5 Cranch (U. S.), 61 *et seq.*), the question has been effectually set at rest by later cases and is no longer open to controversy. The present doctrine, as settled by the supreme court, is, "that where a corporation is created by the laws of a state, the legal presumption is that its members are citizens of the state in which alone the corporate body has a legal existence; and that a suit by or against a corporation in its corporate name must be presumed to be a suit by or against citizens of the state which created the corporate body; and that no averment or evidence to the contrary is admissible for the purposes of withdrawing the suit from the jurisdiction of a court of the United States." *National Steamship Co. v. Tugman*, 106 U. S. 120, 121; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 12, 4 Am. and Eng. R. Cas. 105; *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 81, 82; *Paul v. Virginia*, 8 Wall. (U. S.) 178; *Muller v. Dows*, 94 U. S. 445; *Cowles v. Mercer Co.*, 7 Wall. (U. S.) 121; *Ohio & M. R. Co. v. Wheeler*, 1 Black (U. S.), 296, 297; *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.) 314 *et seq.*; *Louisville, C. & C. R. Co. v. Letson*, 2 How. (U. S.) 497 *et seq.*

Jurisdiction in the case existing, is the suit brought within the proper district? Reference has already been made to the act of 1875 and prior judiciary acts. Notwithstanding those acts, like the act of 1887, authorized suits against a person in the district of which he was an inhabitant, as well (in this respect unlike the act of 1887) as where he might be found, it seems that prior to 1887, when corporation cases, involving the right of the corporation to be sued at a particular place, or in a state other than that of its creation, were presented to the courts for determination, they preferred to rest their decisions rather upon the ground that the corporation was "found" within a certain district than upon the ground of inhabitancy; and no decision of the supreme court has been found by me, or called to my attention, where the point was directly made and passed upon that a corporation is an inhabitant only of the state by which it is created. A similar view is expressed by Judge Blodgett in the case of *Gormully & J. Mfg. Co. v. Pope Mfg. Co.*, 34 Fed. Rep. 820. It is a matter of some

Jurisdiction of corporations under act of 1887—Authorities.

interest to note that, in the earlier cases, several of the circuit courts declined to assume jurisdiction in suits against foreign (non-resident) corporations, although they were engaged in the conduct of their ordinary business in the state where the suit was brought, and had therein agents and servants upon whom process might be served. In the discussion of the question Judge Gresham uses this language: "It is too plain for argument that a corporation can not be found where it can have no legal existence" (*Hume v. Pittsburg, C. & St. L. R. Co.*, 8 Biss. (U. S.) 34); and equally emphatic is Judge Woodruff when he says "such corporation cannot be found out of the state wherein it is created, within the meaning of the statute, and be served by or through its officers." *Myers v. Dorr*, 13 Blatchf. (U. S.) 27. That view of the question was also taken by Mr. Justice Nelson and other judges, but it was completely overthrown by the supreme court in the case of *Ex parte Schollenberger*, in which Mr. Chief Justice Waite, speaking for the court, says: "We are aware that the practice in the circuit courts generally has been to decline jurisdiction in this class of suits. Upon an examination of the reported cases in which this question has been decided, we find that in almost every instance the ruling was made upon the authority of the late Mr. Justice Nelson in *Day v. Newark India Rubber Mfg. Co.*, 1 Blatchf. (U. S.) 628, and *Pomeroy v. New York & N. H. R. Co.*, 4 Blatchf. (U. S.) 120. These cases were decided by the learned justice, the one in 1850, and the other in 1857, long before our decision in *Baltimore & O. R. Co. v. Harris*, *supra*, which was not until 1870, and are, as we think, in conflict with the rule we there established. It may also be remarked, that Mr. Justice Nelson, as a member of this court, concurred in that decision." 96 U. S. 378.

Since the case of *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404 *et seq.*, it has been uniformly held by the supreme court that a corporation "cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have assented, and will be bound accordingly." *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 81. And it is further held that "a corporation of one state, doing business in another, is suable in the courts of the United States established in the latter state, if the laws of that state so provide, and in the manner provided by those laws." *New England Mut. Life Ins. Co. v. Woodworth*, 111 U. S. 146. The doctrine is clearly stated in an able opinion rendered by Judge Jackson in the *Telephone* case, before cited, where the leading authorities are collected. 29 Fed. Rep 35.

The defendant, admitting the general principle, established by

the courts, that a corporation created by one state may be "found" and sued in another in the manner provided "Inhabitant" defined. by the laws of the latter, contends that the rule in no wise affects the residence or habitation of the corporation; that its residence or habitation is at the place of its principal office, and cannot be elsewhere; and that suits against it must be brought in the district in which such principal office is located, that being the only place of which it can be an inhabitant. While Judge Blodgett inclines to the view that a corporation must be held to be an inhabitant only of the place "where it has its principal place of business, where its corporate offices and records are kept, and its corporate meetings are lawfully held," he thus defines "inhabitant:" "An 'inhabitant' of a place is one who ordinarily is personally present there, not merely *in itinere*, but as a resident and dweller therein. *Holmes v. Oregon & C. R. Co.*, 9 Fed. Rep. 229, 1 Am. & Eng. R. Cas. 623. 'Inhabitant: One who dwells or resides permanently in a place, or has a fixed residence, as distinguished from an occasional lodger or visitor.' *Imperial Dict.* 'Inhabitant: 2. (Law.) One who has a legal settlement in a town, city, or parish; a resident.' *Webst. Dict.* 'Inhabitant: A dweller or householder in any place.' *Toml. Law Dict.*" 34 Fed. Rep. 818, 819.

"Citizenship" and "residence" are not synonymous terms (*Robertson v. Cease*, 97 U. S. 648), although "resident" and "inhabitant" are usually so regarded (*In re Wrigley*, 8 Wend. (N. Y.) 140; *Roosevelt v. Kellogg*, 20 Johns. (N. Y.) 210; *Brown v. Boulden*, 18 Tex. 434; *Bouv. Law Dict.* tit. "Residence"); and while a person may be said to have but one domicile, he may have several residences (*Crawford v. Carothers*, 66 Tex. 200; *Brown v. Boulden*, 18 Tex. 434). It is said by Mr. Morse in his *Treatise on Citizenship*, at page 99, that "While an individual can have but one domicile, he may have many residences; the residence may be constructive. . . . The word 'reside' is used in two senses,—the one, constructive, technical, legal; the other, denoting the personal actual habitation of individuals."

The definitions given apply properly to natural, not artificial, persons; to individuals endowed with will and intelligence, rather than to mere creations of law. But corporations are held to be "inhabitants." Thus, "a corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person." *Louisville, C. & C. R. Co. v. Letson*, 2 How. (U. S.) 558. By the laws of Texas, "person" includes a corporation. *Rev. Stat. art. 3140, subd. 2.* Referring to the duty of corporations, imposed upon inhabitants by the statute of Henry

VIII. to repair bridges and highways, Mr. Chief Justice Marshall says that "Under this statute those have been construed inhabitants who hold lands within the city where the bridge to be repaired lies, although they reside elsewhere." And further, on the same page, it is said: "Lord Coke says: 'Every corporation and body politic residing in any county, riding, city, or town corporation, or having lands or tenements in any shire, *quæ propriis manibus et sumptibus possident et habent*, are said to be inhabitants there, within the purview of this statute.'" Bank of United States *v.* Deveaux, 5 Cranch (U. S.), 88, 89; Louisville, C. & C. R. Co. *v.* Letson, 2 How. (U. S.) 558.

The English doctrine as to the competency of an American corporation to acquire a residence in England is stated by Justice Blackburn, in *Newby v. Fire-Arms Co.* In that case the defendant corporation had a place of business in England, and there *de facto* carried on its business, just as an English corporation might have done, but the principal place of business and head office were in America. The court say: "Such a corporation does, for many purposes, reside both in England and in its own country. In the case of *Iron Co. v. Maclaren*, 5 H. L. Cas. 459, Lord St. Leonards, taking a different view of the facts from that taken by Lords Brougham and Cranworth, thought the Scotch corporation was resident in England. We think that there is great good sense in what Lord St. Leonards states to be the law on his view of the facts. He says: 'If the service on the agent is right, it is because, in respect of their house of business in England, they have a domicile in England, and in respect of their manufactory in Scotland they have a domicile there. There may be two domiciles, and two jurisdictions; and in this case there are, as I conceive, two domiciles and a double sort of jurisdiction,—one in Scotland and one in England; and for the purpose of carrying on their business one is just as much the domicile of the corporation as the other.' The majority of the lords took a different view of the facts, and thought that, though the corporation possessed property in England, and had agents there, they did not carry on business there; but we do not find that they differed from Lord St. Leonards' view of the law, if they had agreed as to his facts; and in the present case the fact is clear that the American company are carrying on trade themselves in London, and therefore, we think, must be treated as resident here." L. R. 7 Q. B. 293, 1 Moak, Eng. R. 326, 327.

The supreme court lends recognition to the view that a corporation may have "two domiciles and a double sort of jurisdiction," in the case of *New England Mut. Life Ins. Co. v. Woodworth*. Mr. Justice Blatchford, speaking for the court, in a suit brought in the state of Illinois by a citizen of that state against

a Massachusetts corporation, says: "In view of this legislation and the policy embodied in it, when this corporation, not organized under the laws of Illinois, has by virtue of those laws a place of business in Illinois, and a general agent there, and a resident attorney there for the service of process, and can be compelled to pay its debts there by judicial process, and has issued a policy payable on death to an administrator, the corporation must be regarded as having a domicile there in the sense of the rule that the debt on the policy is assets at its domicile, so as to uphold the grant of letters of administration there." 111 U. S. 145.

It is apparent, from an examination of the *Woodworth Case*, that a corporation cannot only have a domicile in the state of its creation, but for certain purposes, jurisdictional in their nature, it may have an additional one in some other state. Two domiciles being admitted, the conclusion is evident that it may be a resident or an inhabitant of two or more states. Indeed, the assumption seems to me to be unsound, which denies the existence of a double habitation. "All that there is," say the supreme court, "in the legal residence of a corporation in the state of its creation consists in the fact that by its laws the corporations are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without, as well as within, the state. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the states for which they are respectively appointed, when it is called to legal responsibility for their transactions." *St. Clair v. Cox*, 106 U. S. 355, 1 Am. & Eng. R. Cas. 19. In his work on *Removal of Causes*, at page 38, Judge Speer adopts the view that a corporation, while it can only be a citizen and have its legal residence in the state which creates it, may through its agents become an inhabitant of several states, so that it may be sued."

It is also said by the supreme court, speaking of a corporation: "This ideal existence is considered as an inhabitant when the general spirit and purposes of the law require it." And the court propounds the question: "If it be so for the purposes of taxation, why is it not so for the purposes of a suit in the circuit court of the United States, when the plaintiff has the proper residence?" 2 How. (U. S.) 559. The inquiry may be further extended. Do not the general spirit and purposes of the law require a foreign corporation to be an inhabitant of a state when it has agents who transact its corporate business there, and when, under the laws of that state, it may be sued there, and service of process had upon such resident agents? To deny its inhabitancy, under the circumstances named, would

deprive the circuit courts of jurisdiction in an important class of cases, which it is thought was never intended by congress in the enactment of the law of March 3, 1887. For example: An English land, insurance, mortgage, or cattle company, doing business in Texas through the medium of its agents, has the right to invoke the aid of the circuit courts to enforce its rights of property in a suit against a citizen of Texas. But if the corporation be, as urged by the defendant, an inhabitant only of England, the same courts would be powerless to extend relief to the Texas citizen. Such seems not to be the doctrine of the English courts, nor of the supreme court of the United States. If I understand the decisions, in my judgment, it is going too far to suppose that the circuit courts are stripped of their jurisdiction, in cases of that character, by the mere omission in the act of 1887 of the words, contained in the act of 1875,—“or in which he shall be found at the time of serving such process, or commencing such proceeding.”

The defendant, however, insists that the question has been settled by the supreme court and several of the circuit courts in the following cases: *Ex parte Schollenberger*, *supra*; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 11, 4 Am. & Eng. R. Cas. 105; *Filli v. Delaware, L. & W. R. Co.*, 37 Fed. Rep. 66; *Denton v. International Co.*, 36 Fed. Rep. 1, and *Fales v. Chicago, M. & St. P. R. Co.*, 32 Fed. Rep. 673 *et seq.*; and there may be added, *Germania Fire Ins. Co. v. Francis*, 11 Wall. (U. S.) 216. It may be admitted that the circuit court decisions go to the extent claimed for them by the defendant, but, with due respect be it said, I am unable to concur either in the reasoning of the judges, or in the deductions drawn by them from the decisions of the supreme court. They rely mainly upon the cases of *Schollenberger* and *Koontz*. In *Filli v. Delaware, L. & W. R. Co.*, Judge Lacombe says: “Analogy would indicate that the place of its inhabitancy is to be ascertained in the same way as its citizenship, and such is the expressed opinion of the only supreme court decisions bearing upon the point. *Ex parte Schollenberger*, 96 U. S. 377; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 11, 4 Am. & Eng. R. Cas. 105. . . . To sustain any action in this district plaintiff must show that the defendant’s legal habitation is here. This he cannot do unless the rule for ascertaining the citizenship and residence of corporations laid down by the supreme court in the cases cited is departed from.” 37 Fed. Rep. 66.

By referring to the *Schollenberger* case it will be seen that the supreme court waive a decision of the question touching the inhabitancy of the corporation. At page 375 the court expressly say: “It is unnecessary to inquire whether these several companies were inhabitants of the district. The requirements of

the law, for all the purposes of this case, are satisfied if they were found there at the time of the commencement of the suits."

In *Baltimore & O. R. Co. v. Koontz* the question was one of citizenship, and the point ruled, by the court of appeals of Virginia, was, that the company was a corporation of that state, and therefore not entitled to remove the suit to the circuit court. This ruling was reversed by the supreme court of the United States, and it was there held that the company was a Maryland corporation, and for the purposes of jurisdiction a citizen of that state, and, hence, that the suit was removable. If the language of the court be taken in connection with the facts of the case and the question presented, it is apparent that nothing more was, or intended to be, determined than to define and fix the citizenship of the railroad company for jurisdictional purposes. Mr. Chief Justice Waite, delivering the opinion of the court, says: "A corporation may for the purposes of suit be said to be born where by law it is created and organized, and to reside where by or under the authority of its charter its principal office is. A corporation, therefore, created by and organized under the laws of a particular state, and having its principal office there, is, under the constitution and laws, for the purpose of suing and being sued, a citizen of that state, possessing all the rights, and having all the powers, its charter confers. It cannot migrate nor change its residence without the consent, express or implied, of its state; but it may transact business wherever its charter allows, unless prohibited by local laws. Such has been for a long time the settled doctrine of this court. 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.'" 104 U. S. 12.

It appears to my mind that by the use of the word "migrate," the same employed by Mr. Chief Justice Taney in *Bank v. Earle*, 13 Pet. (U. S.) 588, 599, the court simply intended to convey the idea that it was incompetent for a corporation to change its status of citizenship, as fixed by the state of its creation, without the consent lawfully given of proper state authority. And the same may be said of the *Francis* case, which, in essential respects, is quite similar to the case of *Koontz*. In that, the question was one of citizenship, arising upon a petition to remove the suit to the circuit court. The removing party was a New York corporation, but an effort was made to remove the suit by virtue of corporate citizenship in Mississippi. The court say, in denying its right to remove: "The declaration avers that the plaintiff in error (the defendant in the court below) is a corporation created by an act of the legislature of the state of New York, located in Aberdeen, Miss., and doing business there under the laws of the state. This, in legal effect,

is an averment that the defendant was a citizen of New York, because a corporation can have no legal existence outside of the sovereignty by which it was created. Its place of residence is there, and can be nowhere else. Unlike a natural person, it cannot change its domicile at will; and although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there. As, therefore, the declaration is on its face bad in not showing that one of the parties to the suit was a citizen of Mississippi, it follows that the transfer of the cause was not authorized by law." 11 Wall. (U. S.) 216.

It will be observed that the exact question in the case was whether the corporation was a citizen, not resident, of Mississippi, for the fact of residence was entirely immaterial, as citizenship, not residence, confers jurisdiction upon the circuit courts.

The settlement of a disputed question by the supreme court should always find ready acquiescence on the part of the inferior courts; and, in this instance, the court would cheerfully yield to superior authority if that authority had decided the point at issue. "But," employing the language of Judge Sawyer in treating of another controverted question, "I cannot, after a full consideration of the case, satisfy myself that the supreme court designed the decision to be so far-reaching in its effects." *Holmes v. Oregon & C. R. Co.*, 9 Fed. Rep. 242, 1 Am. & Eng. R. Cas. 623. The precise point involved here was not passed upon by the supreme court in any of the cases to which reference has been made, and although some of the general language employed by the court, considered by itself, lends partial sanction to the view urged by counsel, still the rule is recognized that "the language of a judicial opinion must be considered with reference to the case decided" (*Ib.* 243); and, thus considered, it is perfectly clear the supreme court has not decided that a corporation, owing its corporate existence to the laws of a single state, may not, for jurisdictional purposes, be an inhabitant of a state other than that of its creation.

The decisions, it is well to remark, upon which counsel rely, treat of foreign corporations, and reference will now be made to a different line of authorities, where the rule is applied as to domestic corporate bodies. Thus it is said by Judge Blatchford, in *Truck Co. v. Railroad Co.*: "Although this suit is one not of a local nature,—that is, is what, if it were a suit at law, would be a transitory action,—yet the act has no application to a case where a single defendant resides as fully in all the districts in the state as in any one of them. A corporation, if it can be properly said to 'reside' at all, resides in all the districts of the state creating it." 10 Blatchf. (U. S.) 307.

The supreme court of New York say: "It is only upon the

notion that the corporation might be treated as an inhabitant of Washington county that he (the justice) could entertain jurisdiction at all. In my judgment a railroad corporation, whose road passes through two or more counties, may be sued before a justice in either county, provided the process can be served on the proper officer in such county. A railroad company must be treated as an inhabitant and freeholder in each county where its track is laid." *Sherwood v. Saratoga & W. R. Co.*, 15 Barb. (N. Y.) 652.

In *Bristol v. Chicago & A. R. Co.* the supreme court of Illinois apply a similar rule as to the residence of a corporation: "The residence of a corporation—if it can be said to have a residence—is necessarily where it exercises corporate functions. It dwells in the place where its business is done. It is located where its franchises are exercised. It is present where it is engaged in the prosecution of the corporate enterprise. This corporation has a legal residence in any county in which it operates the road, or exercises corporate powers and privileges. In legal contemplation, it resides in the counties through which its road passes, and in which it transacts its business." 15 Ill. 437.

The rule is thus stated by the supreme court of Missouri: "There can be no doubt that, within the limits of the state which grants the charter, a corporation may have a special constructive residence in more places than one, so as to be charged with taxes and dues, and be subjected to the local jurisdiction where its officers and agencies are actually present in the exercise of its franchises and in carrying on its business; and the legal residence of a corporation is not necessarily confined to the locality of its principal office or place of business. It depends on the official exhibition of legal and local existence, and its place of residence may be wherever its corporate business is done." *City of St. Louis v. Wiggins Ferry Co.*, 40 Mo. 586, 587; citing *Glaize v. South Carolina R. Co.*, 1 Strob. (S. Car.) 70; *Cromwell v. Charleston Ins. Co.*, 2 Rich. Law (S. Car.), 512.

The same court, in *Slavens v. South Pac. R. Co.*, following the rule announced in the foregoing case, use the language: "It seems to me upon a fair construction of the statute that a corporation is a resident of the county through which its line of road passes, and in which it has an agent upon whom process can be served, and where suits are authorized to be commenced. It is true, upon this question there have been contradictory decisions." 51 Mo. 309.

At page 310 the court refer to *Baldwin v. Mississippi & W. R. Co.*, 5 Iowa, 518, and *Richardson v. Burlington & M. R. Co.*, 8 Iowa, 260, as having followed and affirmed the doctrine. *Railroad Co. v. Cooper*, 30 Vt. 476, and *Thorn v. Central R. Co.*, 26 N. J. Law, 121, 124, seem to hold a different rule, either

directly or inferentially. The exact points decided by those cases, however, may be easily ascertained by referring to the decisions themselves.

There is no fixed meaning attached, by the laws of this state, to the term "residence" or "habitation" of a railway corporation. "Every railroad or other corporation, organized or doing business in this state under the laws or authority thereof, shall have and maintain a public office or place in this state for the transaction of its business, where transfers of stock shall be made," etc. Const. art. 10, § 3. And by statute it is declared, that "every railroad corporation shall have and maintain a public office at some place upon the line of its road in this state" (Rev. St. art. 4115); and "the public office of a railroad corporation shall be considered the domicile of such corporation" (Ib. art. 4120). The public office may be changed "at pleasure" by publication of notice for a stipulated time. Ib. art. 4118. While the laws do not provide that a railroad corporation may be a resident or inhabitant of any particular county, otherwise than by declaring the public office to be its domicile, it is, by statute, made suable "in any county through or into which the railroad of such corporation extends or is operated" (Rev. St. art. 1198, subd. 21), and "citation may be served on the president, secretary, or treasurer of such company or association (incorporated company or joint-stock association), or upon the local agent representing such company or association in the county in which suit is brought, or by leaving a copy of the same at the principal office of the company during office hours" (Ib. art. 1223).

The road of defendant extends into and through this judicial district. It has local agents here, who transact its ordinary corporate business. It may be sued here under the laws of this state, and process is authorized to be served upon agents representing it here. The fact that it has its principal office in the eastern district, and that, therefore, it is constructively an inhabitant thereof, should not exempt it from suit in this district. In my judgment the general spirit and intent of the law require the defendant, for jurisdictional purposes, to be an inhabitant of this district; and I hold that it must be so regarded within the meaning of the act of congress. The exceptions to the plea in abatement will therefore be sustained. It is a matter of regret that the amount in controversy is not sufficient to authorize a revision of the judgment by the supreme court, whose decision of the question is essential to the establishment of a fixed and uniform rule.

Jurisdiction of Federal Courts—Inhabitant of District—Railroad Company.—In *Filli v. Delaware, L. & W. R. Co.*, 37 Fed. Rep. 65, referred to in the principal case, the greater part of the defendant's railroad was located in the state of New York; and its principal office was in the city of New

York, although it was organized under the laws of Pennsylvania. Its annual elections of directors were held in the principal office; its books and records kept, and its stock transferred there; and its principal officers had their offices there. Of its fourteen directors, eleven were citizens and residents of New York State, and only one was a citizen and resident of Pennsylvania. It was *held*, that being organized under the laws of Pennsylvania, it must be deemed to be an inhabitant of that state, and that an action could not be maintained against it in the southern district of New York.

In *Riddle v. New York, L. E. & W. R. Co.*, 39 Fed. Rep. 290, the defendant company was incorporated under the laws of New York, but was doing business in the western district of Pennsylvania, and had a permanent office in the city of Pittsburgh, in said district, with an officer or agent duly appointed thereto in charge of the defendant's business. Under certain traffic contracts it had acquired the right to transport freight over the lines of another company, which in part were located within said district. Defendant's own railroad was in part constructed within the said district, and was operated by defendant, with offices thereon and officers regularly and permanently in charge of its business. In addition the defendant was the lessee of and operated a third railroad, which in part was constructed through the district. The court declined to follow *Filli v. Delaware, L. & W. R. Co.*, 37 Fed. Rep. 65, and, following instead the principal case, *held*, that the defendant was an inhabitant of the western district of Pennsylvania, within the meaning of the act of congress of 1887.

ATWOOD *et al.*

v.

SHENANDOAH VALLEY R. CO. *et al.*

(*Virginia Supreme Court of Appeals, April 9, 1889.*)

Foreclosure—Supplementary Bill—When not Error to Refuse to Allow Filing of.—In proceedings to foreclose a mortgage, if a supplementary bill contains no new matter, tenders no issue not already made, and seeks no discovery, it is not error to refuse to allow bondholders to file it when the bill is for the first time tendered and leave to file it asked at the term in which decree of foreclosure was rendered, and just as the argument in the cause was about to commence.

Same—Reference to Master—Power to Receive Depositions and Testimony.—Although the master in chancery has made up and submitted to counsel a rough draft of his report, and has closed the taking of testimony, it is within his discretion to retake the depositions of witnesses whose depositions had previously been taken, completed, and signed by them without first obtaining leave of the court to the examination, especially when, by statute, it is provided that "in a suit in equity a deposition may be read if returned before the hearing of the cause, although after an interlocutory decree, if it be as to a matter not thereby adjudged and be returned before a final decree."

Bonds—Validity of Issue—Priority of First and General Mortgage Bondholders.—A railroad company executed a first mortgage to secure an issue

of bonds at the rate of \$15,000 per mile of the completed road. By the mortgage power was reserved to issue a like amount per mile for every mile of road thereafter to be completed. Subsequently a general mortgage was executed to secure bonds amounting to \$25,000 per mile of the road. In the latter mortgage it was provided that bonds might still be issued under the first mortgage, but that they should be retained by the trustee under the general mortgage to secure bondholders thereunder. The general mortgage was executed for the purpose of retiring the bonds secured by the first mortgage, if possible. After the execution of the general mortgage, first mortgage bonds to the amount of \$1,560,000 were executed and deposited with the trustee under the general mortgage. This amount represented \$15,000 per mile of an extension of the road. A prospectus was issued under which the general mortgage bonds were sold, and in which it was represented that the first mortgage bonds would be deposited for the purpose of securing bondholders under the general mortgage. *Held*, that as in a question with the bondholders under the first mortgage, the bondholders in the general mortgage were entitled to the benefit of the issue of the first mortgage bonds for \$1,560,000, and that such issue was authorized and valid.

Same—Company Chartered by Different States—Limitation of Indebtedness.—A railroad company extending through two or more states, and incorporated by the laws of each, is not a joint corporation of the respective states, but a separate corporation in each state, subject only to the laws of the state within the respective jurisdictions; and where such a company was incorporated under an act of the legislature of Virginia, which contained no limitation upon its power to contract debts, the fact that a charter subsequently granted to it by the state of Maryland contained such a limitation does not invalidate bonds issued by it within the state of Virginia.

Same—Issue—Limitation may be Waived by Bondholders.—A limitation contained in a general mortgage restricting the issue of bonds thereunder to \$25,000 per mile is made for the benefit of bondholders under such general mortgage, and may be waived by them, and the bondholders under a prior mortgage cannot, in an action of foreclosure, attack the validity of the issue of the bonds under the general mortgage on the ground that they were in excess of the prescribed limit.

Same—Failure of Trustee to Certify does not Invalidate.—In an action to foreclose a railroad mortgage, the fact that first mortgage bonds issued to secure bondholders under a general mortgage have not been certified by the trustee will not prejudice the rights of the general mortgage bondholders, and if it were necessary the court would compel the trustee to certify them.

Same—Purchase by Financial Agents of Company—Fiduciary Relation.—The purchase of bonds by the financial agents of a railroad company on behalf of a syndicate of which two partners of the firm acting as agents were members is not invalid as a breach of the fiduciary relation of the financial agents, when it appears that the price of the bonds was fixed by the railroad company, and that the agents did not abuse any trust or obtain any advantage from the transaction.

HINTON, J., dissents.

APPEAL from Circuit Court of City of Roanoke.

The Shenandoah Valley R. Co. was incorporated under the laws of the state of Virginia, and given general powers to construct a railroad through the state, etc. Subsequently like privileges were conferred by the states of West Virginia and Mary-

land by different acts of the legislature of each state. Different mortgages were executed by the corporation to secure various bonds, the Fidelity Insurance, Trust & Safe-Deposit Co. being trustee in all of them, and default being made in the payment of the bonds the trustee filed this bill for a foreclosure. A receiver was appointed and the cause was referred to a master, who reported. The court held that the bondholders under a general mortgage were entitled to share in the security of the first mortgage to the extent of \$1,560,000, the amount of first mortgage bonds deposited with the trustee as collateral security for the payment of the general mortgage bonds (the amount so deposited is sometimes erroneously referred to in the record as \$1,545,000, owing to a miscalculation in the number of miles of road built with the proceeds of the general mortgage bonds, as explained in the opinion), and on the 24th day of December, 1887, decreed a foreclosure, etc. Various bondholders became parties by petition pending the suit, and the first mortgage bondholders appeal. Another decree was rendered in April, 1888, from which other parties appealed, but the questions arising thereon are treated in a separate opinion. Fidelity Ins., etc., *Co. v. Shenandoah Val. R. Co.*, *post*, 560.

Joseph Leedom, Chas. L. Lamberton, and William W. & B. T. Crump for appellants.

Wm. J. Robertson and John C. Bullitt for the trustee, appellee.

Camm Patteson and Williams & Boulware for the general mortgage bondholders, appellees.

RICHARDSON, J.—This is a case of far more than ordinary importance, and in the investigation of the complicated questions involved this court has been favored with elaborate arguments, written and oral, of eminent counsel, at home and from abroad, in which the claims of the respective contestants have all been discussed with consummate skill and ability. In this opinion we have no concern with the questions decided by the court below in its decree of April, 1888, as those questions will be treated and decided in separate opinions. We are therefore restricted in this opinion to the consideration of the questions decided in the decree of the court below of December 24, 1887, by which the 1560 first mortgage bonds here in controversy were declared to be valid outstanding obligations of the Shenandoah Valley R. Co., issued under and in pursuance of the terms of said company's first mortgage of April 1, 1880, and properly delivered to and now held by the Fidelity Insurance, Trust & Safe-Deposit Co. as trustee in said company's general mortgage of April 5, 1881, as collateral security for the bonds issued under and in pursuance of the terms of said general mortgage, and now so held by the appellees, the general mortgage bondholders.

But before proceeding to consider this question, we must first dispose of two preliminary questions of practice.

1. It is objected that the circuit court erred in refusing to permit the appellants, the first mortgage bondholders, to file their supplemental bill, which bill was for the first time tendered and leave asked to file it at the term in which the decree complained of was rendered, and just as the argument in the cause was about to commence. From the facts and circumstances disclosed by the record we are clearly of opinion that the objection is without merit. The order of account made in the cause on the 11th of May, 1885, was for the express purpose, as shown on its face, of clearly ascertaining the rights of the respective classes of the creditors of the Shenandoah Valley R. Co. "to satisfaction out of its property and effects, and the amount due or to become due to said classes respectively." Hence the master was directed to take, among others, an account "of the amounts due or hereafter to become due under the respective trust-deeds or mortgages which have been made by said Shenandoah Valley R. Co., "and which have not been released or satisfied, showing the relative rights and priorities and the property included in or conveyed by said deeds respectively." The taking of testimony under this order was commenced on the 26th of February, 1886, and was continued from time to time until the 12th of March, 1887, the counsel for appellants (first mortgage bondholders) being present and participating on each occasion in the examination of witnesses, and introducing witnesses on behalf of their clients. And, as already stated, in the progress of taking this testimony, counsel for the first mortgage bondholders, the appellants, applied to the trustee company, the sole plaintiff in the suit, to be formally recognized of record as counsel by it as trustee, and to be permitted to appear in the trustee's name in order to protect the interests of their clients, the first mortgage bondholders. The request was very properly refused, and for the obvious reasons—First, that it involved the surrender, in part, at least, of the plain right and duty of the trustee company, a common trustee in both the first and general mortgages, to conduct the suit for the protection of the interests of all parties secured by both mortgages; and, second, because to grant the request would be, in effect, to displace its own counsel, which it had no occasion for doing; at the same time, however, expressing the opinion that doubtless the court would recognize the counsel of individual bondholders should they appear and so desire.

Afterwards, at the December term, 1886, the appellants (first mortgage bondholders), upon presenting their petitions to be admitted as parties plaintiff, were allowed to file them, and the

original plaintiff, the Fidelity Insurance, Trust & Safe-Deposit Co., was given until the 15th of January, 1887, to answer the same; and at the same term leave was given Lewis C. Clark, a general mortgage bondholder, to file his petition asking to be admitted as a party defendant, and leave was given the Fidelity Insurance, Trust & Safe-Deposit Co. and the said petitioning first mortgage bondholders to answer it. This action on the part of Lewis C. Clark, it is clear, was induced by the action of said first mortgage bondholders, for in his petition, which was presented on his own behalf and on behalf of the other general mortgage bondholders, he says that he had not previously applied to be made a technical party to the suit, because he, in common with the other bondholders of his class, and also the first mortgage bondholders, had been represented by counsel, with the assent of the plaintiff, the Fidelity Insurance, Trust & Safe-Deposit Co., in the proceedings in the suit; but that, inasmuch as sundry first mortgage bondholders had filed their petitions to be made parties plaintiff, to protect their interests, which were in conflict with the interests of the general mortgage bondholders, it was manifestly proper that, if they should be admitted as parties plaintiff, he, on his own behalf, and on behalf of the other general mortgage bondholders, should be admitted as defendants, and in his petition, stating that the 1560 bonds were then uncertified by the trustee, asked that it should be required to certify them and deliver them to the general mortgage bondholders. In their answers to this petition of Lewis C. Clark, a general mortgage bondholder, the first mortgage bondholders show that the ground, and the only ground, on which they based their application to be admitted as parties plaintiff was their claim that the deposit of the 1560 first mortgage bonds with the Fidelity Insurance, Trust & Safe-Deposit Co., trustee, as security for the general mortgage bondholders, was unauthorized and illegal, and that the trustee company had, in its bill, taken a position in reference to said bonds adverse to the interest of the first mortgage bondholders; and they ask that the application of Lewis C. Clark that the trustee of the first mortgage be required to sign, certify, and deliver these 1560 bonds to the general mortgage bondholders be stricken out as irrelevant and impertinent, and then add "that the question as to the validity of these bonds is one of the main issues in the cause raised under the pleadings and testimony taken and passed upon by the master commissioner in his findings, who holds the said bonds to be invalid; all of which, at and before the filing of said petition, was well known to the solicitor of the petitioner." When this answer was filed all the testimony in the cause was in, and the master (before part of that testimony was taken) had made up and submitted to counsel, as already

stated, the rough draft of his report, in which these 1560 bonds were held to be invalid; but the petitions filed as aforesaid to be admitted as parties plaintiff or defendant had not then been acted on, and were not acted on until the 26th day of July, 1887, when the petitioners were all admitted as parties plaintiff or defendant. Thus it is seen that the first mortgage bondholders, relying on the report of the master, made up before all the evidence now in the record was taken, were disposed, not only to spurn as irrelevant and impertinent the petitioning request of Lewis C. Clark, a general mortgage bondholder, that the trustee be required to certify and deliver the 1560 bonds to the general mortgage bondholders, but they directly affirm that the validity of these bonds is a main question at issue in the cause, and has been passed on by the master adversely to the general mortgage bondholders. It is a doctrine too familiar to need the citation of authorities that a party may always except to a commissioners' report upon the ground that a debt or claim which is invalid has been reported as valid, or that a valid claim has been reported as invalid. Indeed, it was upon the last-named ground that the general mortgage bondholders in this case excepted to the report of the master, and, a question being thus properly raised under the pleadings and evidence in the cause, the circuit court at the hearing entertained and passed upon the question so presented, and rightfully presented, for its consideration and decision. And we are bound to conclude that this was the view taken by the learned counsel for the first mortgage bondholders, or else, we apprehend, they would at the July term, 1887, when they were first admitted as parties plaintiff of record, have asked to change their position from that of plaintiffs to defendants, and to be permitted to file a cross-bill. Nor did they, when so admitted as plaintiffs, even move to suppress any of the evidence in the cause, and it all was then in. The reason is obvious. They were then resting and relying upon the already made up report of the master in their favor, and chose to be quiet as to the after-taken testimony then in the cause.

It is useless to enter into a discussion as to what is or what is not properly supplemental matter, or when and under what circumstances it is proper to allow a supplemental bill to be filed; for, be this as it may, and admitting, for the sake of the argument, that the appellants might have proceeded as well by a supplemental as by a cross bill, it is quite clear that, as the supplemental bill sought no discovery, alleged no new matter, and tendered no issue not already made, the court was right in refusing leave to file it, as delay only would have been the result. Upon principle and authority it is clear that the issue was as fully made up in respect to the validity of the 1560 bonds, and as open to a full consideration and fair decision, as it could have

been by a supplemental bill or by a cross-bill, and that there was really no necessity for either. See *Moorman v. Smoot*, 28 Grat. (Va.) 87; *French v. Townes*, 10 Grat. (Va.) 513; *Faulkner v. Davis*, 18 Grat. (Va.) 652; and numerous other cases that might be cited. In Story's Equity Pleadings the rule applicable to this case is briefly stated as follows: "If new evidence has been discovered since the commission was closed, as to the facts stated in the original bill, the proper course would be, not to file a supplemental bill, but to apply to the court for permission to examine the new witnesses." Story, Eq. Pl. § 344, note 1, citing *Knight v. Knight*, 4 Madd. 1. Here the supplemental bill is grounded solely upon the non-certification of the 1560 bonds, a fact discovered in the course of taking evidence in the cause, and a discovery which seems to have been a surprise to all parties, but it was known to the appellants when they were admitted as parties plaintiff in July, 1877, and is set up in their petition to be made such parties. They did not then ask to suppress any evidence, and doubtless because they relied upon the then made up report of the master to outweigh the subsequently taken testimony. But the master, as he was in duty bound, returned all the evidence, and made a supplemental report, in which he did not content himself with simply referring to the after-taken testimony, but he reported the facts thereby proved, and they were of a most potential nature. Then, just on the eve of the hearing of the cause, the appellants tender their supplemental bill, and, it being rejected, and properly rejected, they direct their attention to the after-taken evidence, and this is the subject next to be considered.

2. The second assignment of error is as to the propriety of the ruling of the court below in refusing to suppress the depositions of certain witnesses. The objection to the depositions of all the witnesses examined after the master had made up and submitted the rough draft of his report, as aforesaid, is that they were taken after the taking of testimony in the cause had been closed by the master, and after he had made up his report and had submitted it to counsel. The objection to the depositions of part of the same witnesses is that their depositions had previously been taken, completed, and signed by them, and that their depositions were afterwards again taken without first obtaining the leave of the court to re-examine them, and that, therefore, they, as well as the others, should be suppressed. We are clearly of opinion that, under the peculiar circumstances of this case, the objection is not well taken. The evidence alone in this case makes a printed volume of 772 pages, two thirds of which is made up of extract copies from the books and papers of the Shenandoah Valley R. Co. The witnesses whose depo-

Master may, in his discretion, take additional testimony.

sitions are sought to be suppressed are Clarence H. Clark, W. G. McDowell, and G. R. W. Armes, who were, or had been, officials of this railroad company, and were supposed to be familiar with the conduct of its affairs, and John B. Gest, vice-president of the Fidelity Insurance, Trust & Safe-Deposit Co. During the taking of the depositions in this cause before the master, three of these witnesses, to wit, McDowell, Armes, and Gest, were several times examined, they signing their depositions each time, and being re-examined from time to time by the master as the facts were developed and their further testimony was needed. This doubtless resulted from the fact that it was impossible to tell at any one time what and how much of the railroad company's actings and doings, as evidenced by its books and papers, or as personally known to these witnesses, might be needed in evidence. It is therefore apparent that justice and the necessities of the situation fully warranted the course thus far pursued by the master. The rule is that a commissioner properly has much latitude of discretion in granting continuances of proceedings before him, and the court whose order he is executing will not overrule his action in that respect unless it be plainly erroneous. Still less will an appellate court reverse a decree for that cause. *Fant v. Miller*, 17 Grat. (Va.) 187.

Under the circumstances above stated we think the action of the master in taking and retaking the depositions of these witnesses was fairly within the spirit of the rule above stated, and was not only authorized but demanded by the necessities and very right of the case. Upon what principle, then, can it be contended that, though the master had adjourned the taking of the depositions *sine die*, and had even made up his report, but had not returned it, as was the case, he could not, for reasons satisfactory to him, and dictated by a sense of duty, and in aid of the justice of the case, proceed to take further testimony? We know of no sufficient reason why he might not do so, his conduct being subject always to the controlling supervision of the court whose order he was executing. And such would seem to have been the view taken by the master himself; for the record shows that while the adjournment of the taking of evidence in the cause occurred on the 17th of February, 1887, yet before the adjournment a commission was regularly issued, after due notice to all parties, to Thomas J. Hunt, commissioner, for the taking of depositions on behalf of the general mortgage bondholders on the 15th of February, 1887, four days prior to said adjournment. Moreover, the counsel for the first mortgage bondholders claim that the taking of testimony before the master closed at a day earlier than the 19th of February, 1887, though the adjournment of the master is of that date. The record shows that the master had given notice for the taking of depositions

before him on the 12th of January, 1887, when, no witnesses appearing, the taking of depositions was continued until the 19th of February, 1887, the date of the master's adjournment *sine die*. At the appointment of January 12, 1887, the counsel of the first mortgage bondholders appeared before the master and entered a protest in writing against the further taking of depositions, claiming that the taking of testimony had been duly and regularly closed on or about the preceding 16th day of December, 1886; and, among other things, said counsel propounded to the master, in writing, the following question: "Has or has not the testimony in the foreclosure proceedings before the master in this case been closed, and, if so, when?" Answer: "The master replies that he considered that the testimony under the order of general reference of 11th of May, 1885, was closed on the 3d day of November, 1886; that since that time he has notified counsel in the cause that he would take and receive any testimony that they should see fit to offer, and return the same to the court, together with any exceptions that might be made thereto. [Signed] Robert E. Scott, Master." Yet the master's adjournment is dated subsequently, to wit, on the 19th of February, 1880, four days before which time depositions had actually been taken before Commissioner Hunt in the city of Philadelphia, under the commission sued out for the purpose as aforesaid, and the record shows that the master, Robert E. Scott, was present. In thus proceeding the commissioner violated no rule of law, practice, common sense, or propriety. Under such circumstances it would indeed require an iron rule to induce a court of conscience to suppress these depositions. It must be conceded that as the law then stood the general rule was that, without the leave of the court, a deposition once taken could not be retaken without the leave of court, but much latitude was always allowed in permitting a second examination. In *Fant v. Miller*, *supra*, Judge Moncure said that when such leave had been granted by the circuit court, even though the court of appeals "differed from the circuit court in regard to the propriety of granting such leave, it would not afford just ground for reversing the decree, at least unless it was palpably improper to grant such leave; as the circuit court ought to possess much latitude of discretion in the decision of such questions." There could be little excuse for holding in this case that the circuit court, had the leave been asked, should not have granted it. Nor is there, as has been shown, anything which rendered it necessary first to obtain from the court a special order authorizing the re-examination of these witnesses. The depositions were taken by the master under the order of the court, and in the due execution of that order, as to the commissioner seemed best, under all the circumstances. In thus proceeding to execute the order the master commissioner

was but the hand of the court, and was, in the nature of things, allowed much latitude of discretion; and, while his action was subject to the control of and liable to be rejected or corrected by the court, and would have been corrected had the discretion allowed been abused, yet that was a matter resting in the sound discretion of the court, and to be exercised in the same manner that the court could correct its own direct acts and proceedings. The court below saw nothing to warrant it in disturbing the action of the master in this respect, and this court sees nothing to authorize it to interfere with what certainly seems to have been a proper exercise of discretion by that court. But more has already been said on this subject than was actually necessary, as the question is settled by statute; nor would the subject have been so fully considered but for an evident misapprehension as to the authority vested in the master independently of the statute. By our statute (Code 1873, c. 172, § 36) it is provided that "in a suit in equity a deposition may be read, if returned before the hearing of the cause, or though after an interlocutory decree, if it be as to a matter not thereby adjudged, and be returned before a final decree." Doubtless this provision was intended by the legislature to preclude the idea that the action of a commissioner in making up and even returning his report could have the effect of preventing the parties, or either of them, from taking further testimony. It may often happen that important evidence is discovered after the return of the commissioner's report, or, from sickness or other cause, a party may not be able to take his testimony, or a party may desire to offer more cumulative evidence; in either of which cases justice demands that the evidence should be considered, unless some good reason to the contrary be shown.

3. We come now to the consideration of the main question in the case, and that is as to the correctness of the decision of the circuit court, awarding to the appellees, the general mortgage bondholders, the benefit of the 1560 first mortgage bonds deposited with the trustee of the general mortgage as collateral security for the general mortgage bonds. The decision of the court below is assailed as erroneous on various grounds, and these, or such of them as it may be necessary to examine, will be considered as we proceed to state and apply to the facts the principles which govern the case and sustain the conclusion arrived at by the court. The very full statement of the case which has been made renders it unnecessary to again state in detail the provisions contained in the legislative enactments of the states of Virginia, West Virginia, and Maryland, respectively, incorporating the Shenandoah Valley R. Co., and conferring upon it certain powers, rights, and privileges, or the proceedings had and authorized by the stockholders and directors of said company in

pursuance of its chartered rights, or of the voluminous facts and circumstances incident to the construction of the company's railroad, the execution by it of the two mortgages,—one of April 1, 1880, known as the "first mortgage;" and the other of April 5, 1881, known as the "general mortgage."

The first inquiry is, did the president and directors have the authority to issue these 1560 bonds under the first mortgage?

This question is readily answered by looking—First, Authority to issue first mortgage bonds for \$1,500,000.

to the act of incorporation, which, in express terms, confers upon the company the right to borrow money for the purposes of the act of incorporation, "and to issue proper certificates of such loans, and to pledge the property of the company, by mortgage or otherwise, for the payment of the same and the interest that may accrue thereon;" and, second, to the first mortgage itself, by which the company conveyed, in trust, all its line of road then and thereafter to be constructed, and all of its property and franchises then possessed or thereafter to be acquired, and declaring on its face that it shall be a continuing lien to secure the full and final payment of all the bonds "which may be created, issued, and negotiated under the security of the same, so that, however, the total amount so created, issued, and negotiated shall not exceed \$15,000 per mile of completed road, single track, whether now completed or hereafter completed, . . . and . . . shall be for the benefit and security of and in trust for the holders of said bonds, without preference, priority, or distinction, as to lien or otherwise, of any over another, and so that each and all of the said bonds to be issued as aforesaid shall have the same right, lien, and privilege under and by the said mortgage, and shall be all equally secured thereby, with like effect as though they had all been made, executed, delivered, and negotiated simultaneously on the date of the said mortgage, to secure the payment of the same." And in the respects just mentioned the general mortgage contains similar provisions, except that it was for \$25,000 per mile, was expressly made subject to the first mortgage, and was for interest at the rate of 6 per cent per annum, instead of 7 per cent, as in the first mortgage. The first mortgage, then, authorized the issue of bonds to the amount of \$15,000 per mile of completed single track. When the road was completed to Waynesborough \$2,270,000 of these bonds had been issued,—that being the aggregate amount at the specified rate per mile to that point,—and the railroad company was without authority to issue any more bonds under that mortgage, except in the event of the extension of its road south from that point, in which event it had, as has been shown, express authority to continue to issue them at the same rate per mile of completed track. Soon after the completion of the road from Hagerstown to Waynesborough,

known as the "Northern Division of the road," the company, casting about for an extension and more desirable connection further south, determined to extend its road and to connect with the Atlantic, Mississippi & Ohio (now the Norfolk & Western), and finally Big Lick (now Roanoke), was fixed on as the point of connection.

At a meeting of the stockholders of the railroad company, held on the 1st day of April, 1881, certain resolutions, as already stated, were passed relating to the construction of the extension of the road south from Waynesborough to Roanoke. By one of these resolutions the company's directors were "requested and advised to provide, at as early a day as in their judgment shall be prudent, for the erection and construction of such extension and the completion and equipment of the railroad of this company, and they are hereby authorized and empowered for the purpose from time to time to use and employ all the powers, resources, and property of this company, so far as in their opinion required, and to make and to authorize the making of such contracts as to them may be deemed advisable." And it is further resolved that, for the purpose of acquiring the means of retiring and cancelling the bonds which had been issued under the first mortgage, and also the bonds which had been issued under a second mortgage, dated April 2, 1880, and for the purpose of increasing the facilities of the company for a speedy completion of the road, the board of directors should be, and they thereby were, authorized and empowered to execute a general mortgage, upon the security of which bonds might be issued, not to exceed \$25,000 per mile then constructed or thereafter to be constructed. And the board of directors were authorized to make such contracts or agreements with the holders of bonds under the first and second mortgages as they might deem proper for the purpose of retiring and cancelling the same, and of obtaining a release of said mortgages, but with this proviso: "Provided, however, in case the board of directors should at any time before the satisfaction of the first mortgage of April 1, 1880, deem it advisable to continue, or from time to time to make issue of bonds under and according to the said first mortgage of April 1, 1880, they shall have full power and authority so to do; but at all times there must be set apart and retained by the trustees of the general mortgage, out of the bonds authorized to be issued under the general mortgage, an amount equal to the bonds secured by the first mortgage of April 1, 1880, then outstanding, for the purpose of retiring the same, unless such first mortgage bonds should come into the possession of the trustees of the general mortgage; it being intended that until all the bonds which have been and may hereafter be issued under the security of the first mortgage of April 1,

1880, and second mortgage of April 2, 1880, shall come into the hands of the trustees of the general mortgage, and such trustees should request and obtain the satisfaction of the first mortgage of April 1, 1880, all the first mortgage bonds which may come into the hands of the trustees of the general mortgage shall be held by them uncanceled, for the security and benefit of the general mortgage bondholders; it being understood, however, that the coupons of such first mortgage bonds shall be cancelled by the trustees of the general mortgage, and surrendered to the company as they mature, provided that at such time the matured coupons upon such of the general mortgage bonds outstanding shall have been duly paid; but the bonds issued under the general mortgage for the purpose of retiring the bonds issued under the first mortgage of April 1, 1880, may be exchanged for the said first mortgage bonds upon such terms as may be agreed upon, or sold, for the purpose of providing the means to purchase or pay off the outstanding first mortgage bonds." These resolutions having been adopted at the stockholders' meeting held on the 1st day of April, 1881, the board of directors of the company met on the 5th of April, 1881, and adopted resolutions approving the bonds and mortgage executed on that day in conformity therewith, the resolutions of the stockholders aforesaid being made, *in totidem verbis*, part of the mortgage, by way of recital. In this authoritative action of the railroad company, we have not only the indisputable evidence of the power of the company to issue these bonds, and that they were issued in exact pursuance of the authority conferred, but of the company's embarrassed condition, and the absolute necessity of husbanding all its resources in order to secure the credit essential to the achievement of its then main object, which was to extend its road south to Roanoke. It had been demonstrated that the road could not be constructed for \$15,000 per mile. It was therefore resolved to resort to a general mortgage on the whole line of road, not to exceed \$25,000 per mile of completed road, and the mortgage of April 5, 1881, was the result. In the execution of this mortgage it was not merely meant to execute a second or subsequent mortgage, but a general mortgage, as the instrument on its face purports to be. The obvious purpose was to retire, either by exchange or purchase, all bonds under prior mortgages, so that eventually there would be but the one general mortgage, by which all the mortgage creditors would be secured, and all would stand on the same footing, without any priority of lien or preference of one over another. With these objects in view, and inspired with the hope of speedily extending and equipping its road, the stockholders, as we have seen, conferred upon the directors of the company authority "to use and employ all the powers, re-

sources, and property of this company, so far as in their opinion required, and to make and to authorize the making of such contracts as to them may be deemed advisable." And to show that the company, in the event then determined upon of extending its road, recognized as prominent among its resources thus dedicated the right to continue to issue bonds under the first mortgage at the specified rate of \$15,000 per mile of completed road, the stockholders further authorized the directors, if they should find it necessary or expedient, to "continue from time to time to make issue of bonds under and according to the terms of the said first mortgage of April 1, 1880."

But the railroad company, foreseeing that it might not succeed in effecting an exchange of its general mortgage bonds for the outstanding first mortgage bonds, and that it might in that event be seriously embarrassed in its operations, determined prudently and wisely to hedge about, and carefully reserve and protect its right to continue the issue of bonds under the first mortgage of April 1, 1880, and this was effected by the provision that "until all bonds which have been and may hereafter be issued under the security of the first mortgage of April 1, 1880, shall come into the hands of the trustee of this mortgage under this provision" (evidently meaning the provision for the exchange of the general mortgage bonds for those of the first mortgage), "and the trustees of this mortgage shall determine the advisability of the satisfaction and release of the said first mortgage of April 1, 1880, all such first mortgage bonds which shall come into the hands of the trustee under this provision shall be held by the trustee uncanceled, for the security and benefit of the holders of bonds secured hereby; it being understood, however, that the coupons of such first mortgage bonds shall be cancelled by the trustee, and surrendered to the party of the first part, as they mature, provided that at such time the matured coupons upon such of the bonds secured hereby and outstanding shall have been duly paid; but when all such first mortgage bonds shall have been acquired by the party of the second part, the said bonds shall then be cancelled by the party of the second part, and the said mortgage shall be satisfied and released as soon thereafter as the same can be conveniently done." On the 20th day of April, 1881, only 15 days after the general mortgage was executed, \$1,545,000 of first mortgage bonds were, in pursuance of the prescribed terms, duly issued by the railroad company and delivered by its treasurer to the Fidelity Insurance, Trust & Safe-Deposit Co. as trustee in the first mortgage, so that they might be ready to be certified by the trustee, and issued in pursuance of the terms of the mortgage, upon the certificate of the engineer, approved by the president of the railroad company, of the completion of additional

miles of road. The \$1,545,000 of bonds were issued and deposited under a mistaken under-estimate of the distance from Waynesborough to Roanoke, the true amount actually issued being \$1,560,000, as explained in the statement of the case. The issue of these bonds immediately after the execution of the general mortgage, and in strict pursuance of the terms of the first mortgage, again clearly evinces the purpose of the directors of the railroad company to avail themselves of the authority conferred by the aforesaid stockholders' resolution, which was made part of the general mortgage, to issue and use for the extension of the road south of Waynesborough all of the first mortgage bonds—that is to say, to the amount of \$15,000 per mile of road as it should be thereafter completed; all the bonds issued for the construction of the road north of Waynesborough having, as already stated, been previously certified by the trustee, and delivered to the railroad company, and by it distributed to the parties entitled thereto. At the meeting of the railroad company's board of directors held on the 5th of April, 1881, a special committee on construction had been appointed, and to that committee was referred "all matters pertaining to the negotiation of the mortgage bonds or other securities of the company, as may be considered necessary or advisable by them, for the purpose of providing means to pay for said construction"—that is, of the road south of Waynesborough; and on the 5th of May, 1881, that committee reported a plan by means of which the amount necessary for the construction south of Waynesborough could be obtained, and, with the report, submitted a prospectus, dated June 30, 1881, and also the form of a subscription list, for the approval of the board. In that prospectus, which, after its approval, as has been shown, was issued in the form of a printed circular, it was stated that the general mortgage of \$25,000 per mile over the entire length of the road, which, it was then supposed, would be 238 miles, amounting in the aggregate to \$5,950,000, had been executed; and that of the amount secured thereby there would be retained in the hands of the trustees, to retire outstanding bonds upon the road already constructed, \$3,575,000, leaving \$2,375,000, and that "these bonds, to the extent of the first mortgage bonds in the hands of the trustee of the general mortgage, will be entitled to part of the security of the first mortgage on the road, inasmuch as the \$1,545,000 (erroneously stated in the circular at \$1,436,000) bonds issued on the ninety-five and three-fourths miles of the extension, under the first mortgage of \$15,000 per mile (which covers the entire line built or to be built), have been lodged with the trustee as collateral on the general mortgage." In the subscription form attached to said prospectus (the circular before referred to) it was stated that the subscriptions were made "upon

the terms and conditions indicated in the above prospectus." This report was "approved and accepted" by the board of directors on the 9th of May, 1881; and at a special meeting of the finance committee held on the 20th of May, 1881, the chairman reported *inter alia*, that the entire amount, \$2,375,000, of general mortgage bonds had been subscribed in accordance with the proposition contained in the circular, and that thereby a sufficient fund was provided for the extension of the road.

The evidence in the record conclusively establishes the fact—indeed, there is no evidence to the contrary—that the general mortgage bonds, the bulk of which were purchased by a syndicate, were purchased, not only by the syndicate, but by subsequent holders of them, or some of them, on the faith of this prospectus or circular, and that one of the inducements to the purchase was the additional security for the payment of them obtained by the deposit with the trustee of the general mortgage of the first mortgage bonds. It is not perceived that the railroad company, in thus pledging these 1560 first mortgage bonds as security for the benefit of the general mortgage bondholders, did any injustice to or violated any contract right of the first mortgage bondholders. Acting under its charter, which authorized the extension of its road, the railroad company executed the first mortgage of April 1, 1880, to secure its bonds, to an extent not exceeding \$15,000 per mile of road then or thereafter to be completed. The road has been extended and completed, and bonds at the rate of \$15,000 per mile, and no more, have been issued under and in pursuance of the terms of the first mortgage. The \$2,270,000 of bonds held by the first mortgage bondholders, and the \$1,560,000 of extension bonds, issued thereunder and pledged for the security of the general mortgage bondholders, together make the aggregate of \$3,830,000 at \$15,000 per mile of the line of road actually constructed.

The proceeds of the bonds held by the first mortgage bondholders were expended entirely on the construction of that part of the road north of Waynesborough, not a dollar thereof having been expended south of that point; while the extension south from Waynesborough was built exclusively with funds derived under the general mortgage. Yet the first mortgage bondholders claim a lien over the entire line of road, prior and superior to that of the general mortgage bondholders. The claim is preposterous. It is true that the general mortgage was made expressly subject to the first mortgage, but, be it observed, it is subject, not to the rights of the present first mortgage bondholders merely, but to all the rights secured by the first mortgage, prominent among which is the right to issue and use the additional bonds here in controversy. Both lots of bonds

General mortgage bondholders entitled to benefit of lien of \$1,560,000 of first mortgage bonds.

were issued in virtue of one and the same authority, under the same mortgage, about the same time, and for the same purpose. Hence the rights of the first mortgage bondholders, as respects the 1560 extension bonds, are precisely the same as those of the general mortgage bondholders; the two stand together as first lienors. Though these 1560 first mortgage bonds, issued and deposited as collateral for the general mortgage bonds, be held to be valid securities under the general mortgage,—and they certainly are such,—how does that fact impair in any way the contract rights of the first mortgage bondholders? Both lots of bonds were issued under and in exact pursuance of the first mortgage, and, if one fails, the other must necessarily fail also; if one is not entitled to the footing of first lien, the other can have no claim to such a position. Suppose the railroad company had issued these bonds and put them on the market for the purpose of securing funds with which to aid the construction of the extension of its road,—and it undoubtedly had the right to do so,—in what worse position would the first bondholders be placed than they are by the application of them as a strengthening plaster,—as a first lien backing and support to the general mortgage bonds? It is certain that they would be in the same relative position now held by them, and that is the position of their own choosing. Nor is there anything in the objection that, if these 1560 bonds be held to be valid, there has been an overissue. These bonds, deposited and held by the trustee of the general mortgage as collateral, are not outstanding obligations of the company in the hands of the public, but are pledged as collateral security,—as backing and bracing for the general mortgage bonds that are outstanding in the hands of the public. And, for illustration, if the railroad company were to-day to pay off, at par, all its outstanding general mortgage bonds, it would at the same time redeem from pledge these bonds held as collateral. It is therefore clear that there is nothing in the idea of overissue from this standpoint.

But it is strenuously insisted that there is an overissue, inasmuch as the bonds issued under the first and general mortgages are greatly in excess of the company's authorized capital stock.

And it is insisted that the court below erred in not deciding that, the charter of the Shenandoah Valley

*No overissue
of bonds.*

R. Co. having been granted by the concurrent legislative action of the states of Virginia, West Virginia, and Maryland, the corporation, in the exercise of its powers, was controlled and limited by the terms and provisions of the charter, and in the mode and manner prescribed, and subject to all the requirements and prohibitions contained in the public acts and laws of each of said states, etc.

This exception is far too long and argumentative to be con-

veniently set out in full. It seems to proceed upon the idea—First. That the act of the railroad company in issuing and depositing these bonds disregarded and violated its charter, and that its act is therefore *ultra vires*, illegal, and void. Second. That the court erred, in that it did not give full faith and credit to the public acts and laws of West Virginia, prescribing that no corporation shall issue any stock or bonds except for money, labor, property, and materials actually purchased, received, and applied to the purposes for which such corporation was organized, and which also prohibit the fictitious increase of the capital stock and indebtedness of any such corporations, etc. Third, that the court below erred in not giving full faith and credit to the public acts and laws of the state of Maryland, which limit the powers of this railroad corporation to borrow money on the credit of the corporation, and to execute bonds therefor, and to pledge the property and income of such company to secure the payment thereof, to an amount not exceeding its capital stock; and it is said that this limitation is contained in the grant by said state to this railroad company. Thus there are several assignments of error under one head. As to the first and second, it is only necessary to say, in the light of what is disclosed by the record, they present nothing whatever for consideration; and as to the third it is founded in an obvious mistake, both as to fact and law. There is nothing of the kind in the grant or charter act of the state of Maryland. This railroad company was incorporated by the Virginia legislature by an act dated February 23, 1867, with an authorized capital stock of \$4,000,000, but with the right to increase it from time to time as before stated. The acts of the states of West Virginia and Maryland were simply conforming acts, respectively. The West Virginia act was passed in February, 1870, and, after reciting the Virginia act, expressly grants "the same rights and privileges within the territory of West Virginia" that were granted by the Virginia act within the territory of that state. And the Maryland act, after reciting both the Virginia act and that of West Virginia, grants within the territory of that state the same rights and privileges granted by the acts of Virginia and West Virginia. Ten years thereafter (the Maryland act having been passed in April, 1870) the Maryland legislature did pass an act, which seems to have been useless, simply authorizing this railroad company to borrow money to an amount not exceeding its authorized capital stock. But that act could not affect the chartered rights of the company, which is a Virginia corporation. But grant, for the sake of the argument, that the 1560 bonds were issued and deposited in contravention of the terms, as claimed, of certain statutes of West Virginia and Maryland, yet the objection may be met by several very satisfactory answers. In the first place, a railroad ex-

tending through two or more states, and incorporated by the laws of each, is not a joint corporation of the two states, but a separate corporation in each state, subject only to the laws of the state within the respective jurisdictions, however those laws may conflict as to the operation of the road. 1 Wood, Ry. Law, 32. This is the recognized doctrine of many courts of the highest authority, especially in the supreme court of the United States. In the case of *Ohio & M. R. Co. v. Wheeler*, 1 Black. (U. S.) 286, that court said, although the company was incorporated by the states of Ohio and Indiana, and was spoken of in the laws of each state as one corporate body, exercising the same powers and fulfilling the same duties in both states, yet it has no legal existence in either state except by the laws of the state; and neither state could confer upon it a corporate existence in the other, nor add to or diminish the powers to be there exercised. If this be sound law, as undoubtedly it is, neither Maryland nor West Virginia could impose any restrictions or limitations upon the exercise of corporate powers in Virginia. Their statutes and laws could have no force in this state, nor can they impair the validity of any bonds issued under the authority of Virginia statutes. The bonds in question were issued in this state in conformity with the charter granted by this state, and they are valid here, and they are valid everywhere, and are now to be enforced by Virginia courts having complete jurisdiction of the subject. If we look to the acts incorporating the Shenandoah Valley R. Co., it will be seen that the first and chief act was that of Virginia, and that the acts of West Virginia and Maryland simply conformed thereto, as already shown.

Here it may be added that the objection made on behalf of the appellants to the validity of the claim of the general mortgage bondholders, on the ground that if the 1560 first mortgage bonds are held to be valid obligations of the company, bonds will, to that extent, have been issued in excess of the \$25,000 per mile allowed by the mortgage, if true, is a matter in no way to the prejudice of the first mortgage bondholders. It is a matter with which they have no concern, for it is absolutely certain that bonds have not been issued under the first mortgage in excess of the \$15,000 per mile allowed by that mortgage, and, if not, the interests of the first mortgage bondholders cannot possibly be affected to their prejudice. And even had there been an excessive issue, which is not the case, the general mortgage bondholders alone could complain; for the limitation upon the issue in excess of \$25,000 per mile was made for their benefit, and for their benefit only, and they would have the right to waive the inhibition, and permit bonds to a greater amount to be issued, if they chose so to do. But it is idle to contend that by holding

Provision limiting issue is for benefit of bondholders.

the 1560 first mortgage bonds to be valid obligations of the company, and enforceable for the benefit of the general mortgage bondholders, the issue of bonds will be greater than that allowed by the general mortgage ; for, by the agreement under which the bonds in dispute were to be held as security for the general mortgage bondholders, the provision for the exchange of general for first mortgage bonds became to that extent inoperative, and it would have been worse than idle for general mortgage bonds to be retained for the purpose of an exchange which never could be effected. It follows, therefore, that the issue of general mortgage bonds to the full amount of which they were issued was entirely legal and proper.

Another objection made and most earnestly pressed is that the 1560 bonds are imperfect and void, because they have never been certified by the trustee. The all-sufficient answer is that, for the purpose of enforcing the lien of these bonds under the first mortgage for the benefit of the general mortgage bondholders, it is not necessary that they should be certified, and, were it necessary, a court of equity would, without hesitation, compel the trustee to certify them. It was his duty to do so, and his neglect, omission, or refusal to perform that duty cannot, in equity, be permitted to defeat the rights of the general mortgage bondholders, who were induced to believe, and had the right to believe, that these securities, upon the faith of which they parted with their money, were in all respects regular and complete. It is a maxim of universal application that "equity regards and treats that as done which in good conscience ought to be done." This maxim is the source of a large part of that division of equity jurisprudence which concerns equitable property, and the doctrines and rules which create and define equitable estates or interests are in great measure derived from its operation. The true meaning of this maxim is that equity will treat the subject-matter of a contract, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as they might have been executed. 1 Pom. Eq. Jur. § 364, and note.

Bonds not void
because not
certified.

Perhaps no better illustration of the universality of the maxim can be found than is afforded in the case of *Frederick v. Frederick*, 1 P. Wms. 710. In that case a person had contracted to become a citizen of London, but died before he had carried this agreement into effect by taking up his freedom. His widow thereupon brought a suit to procure his personal estate to be distributed in accordance with the customs of London, which applied to citizens only, and which prescribed a very different mode of distribution from that which prevailed under the statute in other parts of England. The court, invoking the maxim, held

that the deceased should be regarded as though he were actually a citizen at the time of his death. *Ib.* note 1. So, in the same note, the remark of Lord Chancellor Westbury in *Coventry v. Barclay*, 3 DeGex, J. & S. 320, 328, is cited: "It is the rule of a court of equity to consider that as done which ought to be done, and if, therefore, I find that the accounts and valuation of July, 1860, at the making of which Mr. Bevan was not present, were afterwards accepted and agreed to by him, I shall hold, that the account was, in equity, signed by him at the time when it was so accepted." It may here be said, parenthetically, that, in the light of the equitable doctrine above stated, the provision, "and, without such certificate, said bonds shall not be valid or obligatory for any purpose whatever," can in no manner invalidate the bonds pledged as additional security for the benefit of the general mortgage bondholders.

But the doctrine under discussion rises to yet higher ground, and in a large class of cases deduces the obligations of a trust from powers granted. In discussing the subject of "trusts that arise by construction from powers," it is said in 1 Perry, Trusts, § 248, that, "in dealing with the cases that have arisen upon these inquiries, courts have distributed powers into mere powers, and powers coupled with a trust. Mere powers are purely discretionary with the donee. He may or may not exercise or execute them at his sole will and pleasure, and no court can compel or control his discretion, or exercise it in his stead and place, if for any reason he leaves the power unexecuted. If the donee executes the powers, but executes them in a defective manner, courts may aid the execution and supply the defects, but they cannot exercise or execute mere naked powers conferred upon a donee. It is different with powers coupled with trusts, or powers which imply a trust. In this class of cases the power is so given that it is considered a trust for the benefit of other parties; and, when the form of the gift is such that it can be construed to be a trust, the power becomes imperative, and must be executed. Courts will not allow a clear trust to fail for want of a trustee, nor will they allow a trust to fail by reason of any act or omission of the trustee. Therefore courts will not allow a trust to fail or to be defeated by the refusal or neglect of the trustee to execute a power, if such power is so given that it is reasonably certain that the donor intended that it should be exercised." This doctrine, the soundness of which is beyond all question, so aptly applies to the case in hand as to leave no room for doubt that, if necessary, a court of equity would compel the trustee to certify the bonds in question, it being a duty expressly imposed by the terms of the trust.

We come now to the consideration of perhaps the most in-

- **teresting question in the case.** It is the objection that the sale of the \$2,375,000 of general mortgage bonds was negotiated by the banking-house of E. W. Clark & Co., the financial agents of the Shenandoah Valley R. Co., and were purchased or subscribed for by said banking firm, or by members thereof, standing in a fiduciary relation to said railroad company, which rendered the whole transaction invalid, and therefore rendered the deposit of the 1560 bonds as collateral also invalid. The facts, as disclosed by the record, are these: The firm of E. W. Clark & Co. were, at the time of these transactions, and long prior thereto, the recognized financial agents of the Shenandoah Valley R. Co., and two prominent members of said firm, Clarence H. Clark and F. J. Kimball, were also officers of said railroad company, the latter being its president and the former one of its board of directors; that said banking firm, and especially said Clark and Kimball, members thereof, were not only the financial agents of this railroad company, but were its constant and indulgent friends in the period of its infancy, financial embarrassment, and struggles for existence, and sustained its drooping credit by advancing to it from time to time large sums of money, the result of which was that the firm of E. W. Clark & Co. was forced into liquidation in the name of its successor, the present firm of Clark & Kimball, of which new firm Clarence H. Clark and F. J. Kimball are prominent members; that the firm of E. W. Clark & Co., before going into liquidation, did, as the financial agents of the railroad company, subscribe for the general mortgage bonds, or the bulk of them, some of them having been subscribed for by others, said subscription having been by E. W. Clark & Co., not for itself as a firm, but for a syndicate composed of members of the firm and others; that Clarence H. Clark and F. J. Kimball, members of said firm, became thus the individual owners, respectively, of very large numbers of said bonds, and that one of the inducements to such subscriptions was the agreement of the railroad company, put forth in its said prospectus, to pledge, as collateral for the bonds so subscribed for, the 1560 bonds in dispute; and that the price at which the general mortgage bonds were put upon the market was fixed not by E. W. Clark & Co., as financial agents, but was prescribed by the railroad company itself, through its finance committee, in a resolution adopted thereby, at a special meeting of said committee held at Philadelphia, on the 20th of May, 1881, as follows: "Resolved, that the general mortgage bonds of the company should be offered on the following terms: Each bond of \$1000 and five shares of stock for one thousand dollars (\$1000) in cash (less a commission of five per cent), and accrued interest on bond," etc. At the price thus prescribed by

Purchase by financial agents was not a breach of fiduciary relation.

the railroad company the general mortgage bonds were subscribed for, and the amount so subscribed was paid to the railroad company in cash, and was actually expended in the construction of the extension of the railroad from Waynesborough to Roanoke.

In the light of these facts, which are clearly established, we discover not in the purchasers or holders of these 1560 bonds the conduct of faithless trustees or agents, but that of generous, public-spirited friends and benefactors, whose liberality contributed largely to the building of this important line of railroad. It is not necessary to discriminate nicely as to who were the real purchasers of the general mortgage bonds, nor is it material whether they were so purchased by the firm of E. W. Clark & Co., or by a syndicate composed of members of that firm and others. Let it be conceded that they were purchased by said firm, at the time the financial agents of the railroad company, all that could be required is that their conduct was open and fair, and the transaction conducted in the utmost good faith. It is not intended to deny or in any way question the rule that whether such an agent, be he the financial agent or president or director of the railroad company, is, strictly speaking, to be called a trustee or not; for there can be no doubt that in either case the character is a fiduciary one, being intrusted by the company with powers to be exercised for the common and general interests of the corporation, and not for its or their or his private interests; and that, whether the one or the other, the doctrine applies by which equity requires that confidence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon the party intrusted to deal, on his own behalf, in respect to any matter involving such confidence. The inhibitory principle announced, and universally applied under this rule, has no earthly application to the circumstances of the case in hand; for here no trust has been abused, and no advantage obtained by the trustee or agent. It will be found, on examination of the cases in which this salutary principle of equity has been applied, that they all proceed upon the idea either that the agent or trustee is so situated that he cannot make a contract, for his own benefit, with respect to the subject of the trust, or that he has gained some advantage in dealing therewith, which, in equity and good conscience, inures to the benefit of the *cestui que trust*. The agent here, whether the firm of E. W. Clark & Co., the financial agents of the railroad company, or members of that firm, composing a syndicate, or Clarence H. Clark, a director of the railroad company, or F. J. Kimball, its president, was guilty of no concealment, entered into no transaction bringing their duty as trustees or agents into conflict with their private interests; nor did they, as such trustees and agents, have in their custody any property to be sold

by them in such fiduciary relations; nor did they gain any undue advantage over either the company or its creditors, or reap any profit by any transaction touching the company's property. On the contrary, they simply lent their money to the railroad company upon the terms prescribed by it, as any stranger might do, and took the security for the payment thereof pledged under the general mortgage, and against this there is no bar in either law or morals. It cannot be maintained that the rule in question, or any rule, forbids a dealing of this character, nor has any case gone to the unreasonable extent of so holding. See note to *Fox v. Mackreth*, 1 Lead. Cas. Eq. 237; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Omaha Hotel Co. v. Wade*, 97 U. S. 15.

In the last-named case it was said: "But where stockholders sanction a contract under which directors loaned money to the corporation, and its bonds, secured by mortgage, are given, if the money is properly applied, the corporation is estopped from setting up that the bonds and mortgage are void by reason of the trust relations which directors sustained to it." Here the railroad company not only obtained the loan on the terms dictated by it, but secured the cash, and actually expended it in the construction of the extension of the road. Could there be any higher sanction than this? We think not. It would be an almost barbarous rule that would forbid a transaction of this character, and one that would at least hazard the undoing of all the common transactions of mankind. Even in the cases where the equitable principle in question is given its widest sweep, the general rule is that the contract may be avoided at the election of the stockholders or *cestui que trust*, upon the terms of restoring what the trustee or agent has parted with in the transaction. The principle underlying this doctrine is favorably stated by Finch, J. in *Duncomb v. New York, H. & N.R. Co.*, 84 N. Y. 190, 4 Am. & Eng. R. Cas. 293, where it is said: "Nor is it at all questioned that, in such cases, the right of the beneficiary, or those claiming through him, to avoidance, does not depend upon the question whether the trustee in fact has acted fraudulently, or in good faith and honestly, but is founded on the known weakness of human nature, and the peril of permitting any sort of collision between the personal interests of the individual and his duties as trustee, in his fiduciary character. *Daroue v. Fanning*, 2 Johns. Ch. 260. But the rule was adopted to secure justice, not to work injustice; to prevent a wrong, not to substitute one wrong for another; and hence have arisen limitations upon its operation, calculated to guard it against evil results as inequitable as those it was designed to prevent. Thus the beneficiary may avoid the act of the trustee, but cannot do so without restoring what it has received. *Governor, etc., v. Mackenzie*, 8 Brown, Parl. Cas. 42. To cling to the fruits of the trustee's

dealing while seeking to avoid his act; to take the benefit of his loan, and yet avoid and reverse its security — would be grossly inequitable and unjust. It would turn a rule designed as a protection into a weapon of offence and injustice."

Putting aside all mere verbiage about buying and selling bonds, and looking at this transaction in its true light, it was simply a lending of money on the one hand and borrowing on the other, and, to secure the payment of the loan thus obtained, the railroad company issued its bonds, secured under its general mortgage of April 5, 1881, by which it pledged all its line of road as aforesaid, all its property, rights, and franchises, and pledged the 1560 bonds as collateral for said general mortgage bonds. *Town of Danville v. Sutherlin*, 20 Grat. (Va.) 555. The pledge was a valid one, whether made for a debt simultaneously contracted or for a pre-existing debt. See *Duncomb v. New York, H. & N. R. Co.*, *supra*; *Jones, Pledges*, § 74; *Jones, Ry. Sec.* § 209; and numerous cases cited. In the light of the authorities, there can be no doubt that the railroad company had the perfect right to issue and pledge the 1560 bonds in dispute as collateral security for the general mortgage bonds. After a most laborious investigation of the case, as presented by the record, we feel constrained to say we discover nothing in the least calculated to cast suspicion upon the actings and doings of the Shenandoah Valley R. Co., or upon the acts or conduct of its officers and agents who have testified in this cause. The conduct of all of them seems to have been open and fair, and above suspicion. The same is true of the officers and agents of the Fidelity Insurance, Trust & Safe-Deposit Co., notwithstanding the failure to certify, as required, the 1560 bonds in question, which is explained with entire satisfaction by Mr. Gest, the vice-president of the company, who also gave his deposition in the cause. We are entirely satisfied that the decision of the circuit court was eminently proper, and the same must, as respects said 1560 bonds, be affirmed.

HINTON, J., dissenting.

FIDELITY INSURANCE, TRUST AND SAFE-DEPOSIT CO. *et al.*

v.

SHENANDOAH VALLEY R. CO. *et al.*

(*Virginia Supreme Court, April 11, 1889.*)

Constitutional Law—Lien for Cars and Engines Furnished—Title of Act.—The provision of the Virginia act of March 21, 1877, entitled "An act to secure the payment of wages or salaries to certain employees of railway, steamboat, and other corporations," and of the act of April 2, 1879, entitled "An act to amend and re-enact the first and second sections of an act approved March 21, 1877, entitled," etc., which declares that persons furnishing cars and engines to any railroad company shall have a prior lien on the franchise, etc., is unconstitutional and invalid under the constitutional provision which declares that "no law shall embrace more than one subject which shall be expressed in its title."

Foreclosure—Price of Rolling Stock Payable in Instalments—Current Receipts.—Where engines and other rolling stock are furnished to a railroad company under an agreement by which the price is to be paid in instalments, the title, however, to be retained until it should be fully paid, and a receiver of the company is appointed who pays for the use of the cars during the receivership, the persons furnishing the cars are not entitled to the payment of the amount due them so far as not secured by their liens upon the cars from the current receipts of the railroad, but are, as to such sum, simply general creditors.

Bonds—Surrender of Coupons in Exchange for Postponed Bonds—Satisfaction.—Where a firm of bankers who acted as financial agents of a railroad company surrendered coupons of the first and general mortgages of the company, and received in exchange bonds secured by an income or third mortgage of the road for sixty per cent of their par value, which were guaranteed to a certain extent by a third and solvent party, and were issued to pay the floating and accruing indebtedness of the company, the transaction operates as a satisfaction of the coupons surrendered, and the bankers are not entitled to the benefit of the lien of the first and general mortgages.

Liens of Laborers and Supplymen—Subrogation of Creditor Advancing Money to Pay Claims.—Where the financial agents of a railroad company advanced money to the company without any special agreement as to the manner of its application, and received as security therefor mortgage bonds, they are not entitled, by reason of the fact that a part of the money advanced was paid out to laborers and supplymen to be subrogated to the lien of such laborers and supplymen.

First Mortgage Bonds—Lien of Coupons—Estoppel from Claiming Benefit.—A firm which acted as financial agents of a railroad company, and the two partners of which were respectively president and director of the company, is estopped by statements made to the stock exchange in applying to have the mortgage bonds of the company, including certain income

bonds, "listed," from claiming the benefit of the lien of first mortgage bond coupons paid out of money advanced by it to the railroad company, and secured by income bonds, if it would act unjustly upon innocent purchasers who acquired title in reliance upon such statements, to give effect to such lien.

APPEAL from Circuit Court of the City of Roanoke.

A decree entered in an action to foreclose a railway mortgage declared that certain creditors had a lien for rolling stock furnished on the property of the railroad company superior to the lien of the holders of mortgage bonds. The claims of the holders of certain "income bonds" to priority, was rejected except in so far as the income bonds had been paid for with coupons of prior mortgages. The facts out of which the action arose will be found in the opinion and in the report of *Atwood v. Shenandoah Valley R. Co.*, ante, p. 534, which arose out of the same transactions. The holders of the income bonds, and also the first mortgage bondholders, appeal from the portions of the decree respectively affecting them.

Chas. L. Lamberton, Joseph Leedom, W. W. & B. T. Crump, W. R. Staples, and Jos. S. Clark for various appellants.

Johnston, Williams & Boulware, Camm Patteson, Wm. J. Robertson, F. P. Clark, W. R. Staples, H. Gordon McCouch, R. C. Dame, and W. H. Travers for various appellees.

LEWIS, P.—We are of opinion that so much of the decree of the April term, 1888, is erroneous as decides that the claims designated in the record as the "car-trust claims" constitute a lien on the franchises and all the property, real and personal, of the defendant company. These claims are for engines and other rolling stock which were furnished by the Railroad Equipment Co., E. E. Denniston, and other persons, to the defendant company, at different times, prior to the commencement of the present suit, and for which the company undertook to pay in monthly instalments; the title, however, to be retained until the equipment should be fully paid for. As appears from the master's report, the aggregate amount of these claims exceeds the sum of \$700,000,—a sum equal to, or perhaps in excess of, the real value of the equipment,—and they are reported by him, and adjudged by the court to be liens on the property of the company prior to the mortgages in question. This conclusion is based on certain provisions of the statute approved March 21, 1877, as amended by an act approved April 2, 1879 (Acts 1876-77, p. 188; Acts 1878-79, p. 352), and its correctness, therefore, depends upon the validity of those provisions. The title of the first-mentioned act is "An act to secure the payment of wages or salaries to certain employees of railway, steamboat, and other

Statute confer-
ring lien for
rolling stock
is unconstitutional.

corporations." And the first section of the act enacts "that hereafter all conductors, brakemen, engine-drivers, firemen, captains, stewards, pilots, clerks, depot or office-agents, storekeepers, mechanics or laborers, and all persons furnishing railroad-iron, fuel, and all other supplies necessary for the operation of trains and engines, employed in the service of any railroad, canal, or other transportation company, chartered under or by the laws of this state, or doing business within its limits, shall have a prior lien on the franchise, the gross earnings, and on all the real and personal property of said company which is used in operating the same, for and to the extent of the wages or salaries contracted to be paid them by said company; and no mortgage, deed of trust, sale, conveyance, or hypothecation hereafter executed of said property shall defeat, or take precedence over said lien." The second section then goes on to provide how the lien secured by the first section shall, in order to avail, be verified and recorded, and the third section protects the rights of an assignee of the lien. The title of the amendatory act is as follows: "An act to amend and re-enact the first and second sections of an act approved March 21, 1877, entitled 'An act to secure the payment of the wages or salaries of certain employees of railway, canal, steamboat, and other transportation companies.'" And the only amendment made by the act which is material to the present case is that it adds the words "engines" and "cars" to the list of supplies mentioned in the first section of the original act, and for which a lien is given. The question upon which this branch of the case depends is whether this legislation, so far as it relates to what is known as supply creditors, is germane to the title of the statute, or whether it is not sufficiently indicated by the title, and therefore invalid by virtue of the constitutional requirement that "no law shall embrace more than one object, which shall be expressed in its title." Const. art. 5, § 15.

The question is a grave one, and we fully appreciate its importance and delicacy. Every act of the legislature is presumed to be constitutional, and ought to be sustained by the courts, unless the conflict between the statute and the constitution be palpable. And especially is this so in a case like the present, as it is often difficult to determine the degree of particularity which must be observed in the title of a statute in order to make the title and the body of the act conform to the constitutional requirement. But where the repugnancy between the statute and the constitution is too clear to admit of reasonable doubt the constitution must prevail, and the statute, to the extent of the repugnancy, must be declared invalid, be the consequences what they may.

As to the constitutional provision in question, it is, as we have

had occasion in a recent case to declare, not only mandatory, but of great public utility. It was introduced into the constitution for a wise purpose, and ought to be reasonably interpreted and firmly enforced. Its object is to prevent corrupt or surreptitious legislation by incorporating into a bill obnoxious provisions of which the title gives no indication, and its requirement is that the title, while it need not be a complete index of the act, must indicate its object with sufficient distinctness to enable the members of the legislature to fairly understand it by simply hearing the title read. In other words, the title is not to be used as a deceptive cover for vicious or surreptitious legislation.

When the title is general, as it may be, all persons interested are put upon inquiry as to anything in the body of the act which is germane to the subject expressed. But when the title is restrictive, and confined to a special feature of a particular subject, the natural inference is that other features of the same general subject are excluded. "As the legislature,"

Authorities says Judge Cooley, "may make the title to an act as restrictive as they please, it is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might with entire propriety have been embraced in one enactment with the matters indicated by the title, but which must now be excluded, because the title has been made unnecessarily restrictive." "Nor can the courts," he adds, "enlarge the scope of the title. They are vested with no dispensing power. The constitution has made the title the conclusive index to the legislative intent as to what shall have operation. It is no answer to say that the title might have been made more comprehensive, if, in fact, the legislature have not seen fit to make it so." Cooley, Const. Lim. 149. In a recent case in the supreme court of Pennsylvania it is said: "The purpose of the constitutional provision is to prevent a number of different and unconnected subjects from being gathered into one act, and thus to prevent unwise or injurious legislation by a combination of interests. Another purpose was to give information to the members or others interested, by the title of the bill, of the contemplated legislation, and thereby to prevent the passage of unknown and alien subjects, which might be coiled up in the folds of the bill. The provision was found necessary to correct the evils of unwise, imprudent, and corrupt legislation, and therefore is to receive an interpretation that will effectuate its true purpose. It would not do to require the title to be a complete index to the contents of the bill, for this would make legislation too difficult, and bring it into constant danger of being declared void. But, on the other hand, the title should be so certain as not to mislead." "We are not called upon," the court further said, "to show the necessity or vindicate the wisdom of the con-

stitutional requirement. It is enough for us to know that it is an express mandate of the organic law, which the legislature ought to obey, and the courts are bound to enforce. While it may be difficult to formulate a rule by which to determine the extent to which the title of a bill must specialize its object, it may be safely assumed that the title must not only embrace the subject of proposed legislation, but also express the same so clearly and fully as to give notice of the legislative purpose to those who may be specially interested therein. Unless it does this it is useless." *In re Road of Phoenixville*, 109 Pa. St. 44. The constitution of Michigan contains, as do the constitutions of many other states in the Union, a provision identical with that of our own constitution above quoted; and in the case of *People v. Mahaney*, 13 Mich. 481, the supreme court of that state, after referring to the practice which had theretofore prevailed of including in one act subjects of diverse natures, and saying that it was corruptive both to the legislature and the state, used this language: "It was scarcely more so, however, than another practice, also intended to be remedied by the constitutional provision, by which, through dextrous management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. . . . The framers of the constitution meant to put an end to legislation of this vicious character, which was little else than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly notified of its design when required to pass upon it." See also *Board of Supervisors v. McGruder* (Va.), 6 S. E. Rep. 232; *Lane v. State*, 49 N. J. Law, 673; *City of Kansas v. Payne*, 71 Mo. 159; *Cutlip v. Sheriff*, 3 W. Va. 588; *Hingle v. State*, 24 Ind. 28; *Ryerson v. Utley*, 16 Mich. 269; *Failing v. Commissioners of Highways*, 53 Barb. (N. Y.) 70; *Prothro v. Orr*, 12 Ga. 36; *Montclair v. Ramsdell*, 107 U. S. 147; *Carter County v. Sinton*, 120 U. S. 517; *Ex parte Thomson*, 16 Neb. 238.

In the light of these principles, there can be no reasonable doubt, we think, that so much of the act, and the act amendatory thereof, as is relied on in the present case, is repugnant to the constitution, and therefore void. The simple and single purpose indicated by the titles to the two acts is to secure the payment of wages or salaries to certain employees. And we have only to regard the plain and well-understood meaning of those terms to see that by no possibility can they be made to embrace the claims in question. The price of a locomotive is not wages or salary, and a person who builds and sells locomotives, cars, etc., is, presumably, not an employee, but an employer. *Bouvier*

defines "wages" to be "a compensation given to a hired person for his or her services," and "salary" he defines as "a reward or recompense for services performed; . . . the price of hiring of domestic servants and workmen;" though the term is usually applied, he says, to the reward paid to a public officer for the performance of his official duties. We do not see how argument can make plainer the invalidity of the act in the particular mentioned. The title is misleading and deceptive. It gave not the remotest intimation of the provisions of the act relied on here, which are foreign to the subject expressed in the title; and to sustain the act in its entirety would be, in effect, by judicial construction, to eliminate from the constitution one of its most important provisions, or, at all events, to seriously impair its usefulness. This the courts have no power to do. Our duty in such a case is to maintain the constitution inviolate, and to declare void so much of the act as is inconsistent therewith. And a decree in the present case will be entered accordingly.

It is insisted, however, that, whether the statute be valid or not, the claims in question are privileged debts, entitling the claimants to superior equities to the mortgage creditors, according to the doctrine of *Fosdick v. Schall*, 99 U. S. 235; *Williamson v. Washington City, V. M. & C. R. Co.*, 33 Gratt. (Va.) 624; and other cases of that class. In those cases the principle (now well established in the jurisprudence of the country) was announced that when the current receipts of a railroad, which are always first applicable to the payment of its current debts,—i. e., debts for labor, supplies, and the like,—are used in paying the mortgage debt, or in strengthening or protecting the security, it is competent and proper for a court of equity, when asked by the mortgagees to take possession of the road, and to hold and operate it for their benefit by the appointment of a receiver, to direct that the fund thus diverted be restored from the income of the receivership, or, under some circumstances, even from the proceeds of the sale of the *corpus* of the property. *Union Trust Co. v. Souther*, 107 U. S. 591; *Burnham v. Bowen*, 111 U. S. 776; *St. Louis, A. & T. H. R. Co. v. Cleveland, C. & I. R. Co.*, 125 U. S. 658, 673, 33 Am. & Eng. R. Cas. 16; *Hale v. Frost*, 99 U. S. 389. But the present case is not within this principle. Indeed, the case of *Fosdick v. Schall*, so far from supporting, is an authority against, the position of the claimants. There certain cars had been sold by the appellee to the railroad company, before the appointment of a receiver, to be paid for in instalments, and the title was retained until all the payments should be made. Default was made in the payments, and, under orders in the cause, the receiver paid for the use of the cars during the receivership, but the vendor insisted that he was entitled, in

Claims for
rolling stock
held not to
be privileged
under doctrine
of *Fosdick v.*
Schall.

addition to this, to take back the cars, and also to be paid the balance due him out of any funds in court to the credit of the cause, not otherwise appropriated. The supreme court held he could reclaim the cars, and that he was entitled to be paid for their use by the receiver, but that for any balance that might be due him, after his own reserved security had been exhausted, he occupied the position of a general creditor only. And the present case stands upon the same footing. Here there was, in legal effect, a conditional sale of the equipment in question, with a retention of title as a security for the purchase money. The written contracts between the parties, it is true, purport to be leases, but the mere language used is by no means conclusive of the legal nature of the transactions. As was said in *Hervey v. R. I. Locomotive Works*, 93 U. S. 664, which also was a case of a rolling stock contract: "The transaction is not changed by giving it the form of a lease. In determining the real character of a contract, courts will always look to its purpose rather than to the name given it by the parties." The claimants, moreover, had been paid by the receiver, with the sanction of the court, for the use of the equipment by him, and this was proper, as it is the duty of a court to pay from the trust fund in its possession all the debts it incurs in administering the trust. *Myer v. Western Car Co.*, 102 U. S. 1, 2 Am. & Eng. R. Cas. 375. They are also entitled to enforce what is, in effect, a lien retained by them upon the equipment for whatever may now be due them,—that is to say, they are entitled to reclaim it; nor is this disputed. But, as for any balance that may remain after enforcing that lien, they are, as the supreme court said in *Fosdick v. Schall*, general creditors only, with no special equities in their favor.

To the same effect in *Huidekoper v. Hinckley Locomotive Works*, 99 U. S. 258, which was the case of a conditional sale of locomotives, and in which the same principle was applied. In *Burnham v. Bowen*, 111 U. S. 776, a claim for coal furnished the railroad company, to be used on its engines, before the appointment of a receiver, was allowed on the ground that the income of the receivership had been used to pay off incumbrances on the mortgaged property, thereby increasing the security of the bondholders at the expense of the labor and supply creditors. It was held that this was such a diversion of what was denominated the "current debt fund" as to make it proper to require the mortgagees to pay it back. The court, however, added, by way of caution, as in *Union Trust Co. v. Morrison*, 125 U. S. 591, it afterwards repeated: "We do not now hold, any more than we did in *Fosdick v. Schall*, or *Huidekoper v. Locomotive Works*, that the income of a railroad in the hands of a receiver for the benefit of mortgage creditors who have a lien upon it under their mortgage can be taken away from them and used

to pay the general creditors of the road. All we then decided, and all we now decide, is that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use." The same principle was recognized in *Addison v. Lewis*, 75 Va. 701, in which case, after referring to *Fosdick v. Schall* and similar cases, Judge Christian, in whose opinion all the judges present concurred, said: "It has been said, and said truly, that these decisions constitute 'a new departure,' and I am not disposed to extend the doctrine one inch beyond the point to which the authority of these cases plainly points." Many other cases were referred to in the argument, which we have examined, but it is unnecessary to comment upon them. The truth is, no invariable rule is deducible from the authorities. Each case must therefore be decided in the light of its own circumstances, and, so viewing the present case, we think the claims in question are not such debts as ought in equity and good conscience to be accorded priority over the mortgage creditors. It was not alleged in the petitions of intervention filed by the claimants in the court below, nor is it proven, that any portion of the current income of the company, before the appointment of the receiver, was wrongfully diverted in the interest of the bondholders; and where there has been "no diversion, there can be no restoration." This, then, disposes of the car-trust claims.

We come next to consider the case of Messrs. Clark & Kimball, bankers, of Philadelphia, who have also appealed from so much of the decree as postpones to the first and second mortgages their claim to priority over those mortgages to the extent of the promissory notes of the Shenandoah Valley R. Co. used by them in purchasing income mortgage bonds of the company, and now held by them. On the other hand, the appellees complain of the decree, under the ninth rule of the court, on the ground that the decree goes too far in favor of the said appellants, in giving them the benefit of the liens of the coupons which were used by them in purchasing income bonds, and who insist that this alleged error should be corrected. The ground of this contention is that the coupons, when surrendered to the company, were paid for and discharged with income bonds, and consequently the liens to secure them were, to that extent, extinguished also. A brief reference to the facts is essential to a correct understanding of the questions thus raised. The appellants, Clark & Kimball, were for a long while the bankers of the railroad company, and appear to have rendered it valuable pecuniary aid. Their unpaid loans to the company at one time

Bankers
advancing
money held
not entitled to
benefit of lien
of coupons.

amounted to nearly a half million dollars, which were evidenced by the promissory notes of the company. Much of the money thus loaned, it is claimed, went to pay off labor and supply claims, and other privileged debts of the company. They also held a large amount of the first and general mortgage coupons of the company, maturing in 1883 and 1884. These, with the notes above mentioned, were used at par in purchasing income bonds at 60 cents on the dollar, which bonds are secured by what is called the "income" or "third" mortgage on the road. The appellants' claim is founded upon two propositions, namely (1) that, as to the coupons, there was a mere exchange of securities, without affecting the debt of which the coupons were the evidence; and (2) that, as to the promissory notes, the money for which they were given was used in the payment of preferred debts, and therefore that the appellants are entitled to be subrogated to the rights and privileges of the creditors whose debts were thus paid. There is certainly no better settled principle, nor one, perhaps, which has oftener been recognized and acted upon by this court, than that no mere change in the form of the evidence of a debt secured by mortgage, deed of trust, or a vendor's lien, will operate to discharge the debt, unless so intended by the parties. The cases of *Yancey v. Mauck*, 15 Grat. (Va.) 300; *Gibert v. Washington City, V. M., etc., R. Co.*, 33 Grat. (Va.) 586; and *Stimpson v. Bishop*, 82 Va. 190,—may be mentioned among the many cases in this court on that subject. At the same time it is equally well settled that, where one security is accepted by the creditor in satisfaction of another, the debt evidenced by the latter is discharged. In a case, therefore, of a change of securities, the question always is, what was the intention of the parties? Or, as it is usually expressed, the question whether the transaction amounts to a novation is a question of intention, to be derived from all the circumstances of the case, although nothing positive be expressed. And, in the absence of proof of a special agreement, the giving up or the retention of the original security will, in general, be a decisive circumstance in determining that question; for, if the creditor means, in any contingency, to resort to the original indebtedness, he will scarcely be willing to surrender all evidence of that indebtedness to his debtor, without fortifying himself with some acknowledgment of the real nature of the transaction. This was decided in *Morriss v. Harveys*, 75 Va. 726, and such is the well-settled doctrine. In the present case there was no express agreement when the coupons in question were surrendered, and hence we must look to the surrounding circumstances to ascertain what the intention of the parties was.

It appears from the record that income bonds to the amount of \$1,500,000 were issued and sold by the railroad company,

which were principally paid for with the coupons and notes above mentioned. These bonds were secured, as stated, by what is called the "income" or "third" mortgage. That mortgage was executed in accordance with a previous agreement between the Shenandoah Valley R. Co. and the Norfolk & Western R. Co., bearing date December 29, 1882. That agreement shows that by a previous contract between the same parties, dated September 27, 1881, the Shenandoah Valley Co. had agreed to complete its road, the southern terminus of which was then at Waynesborough, to a junction with the Norfolk & Western road, which, up to the 29th of December, 1882, it had failed to do. Accordingly it was agreed that, in order "to pay and provide for its floating and accruing indebtedness," and to raise the means to complete its road, the Shenandoah Valley Co. would issue income bonds and secure them by an additional mortgage; and "for the purpose of adding to the value of said income bonds, and more promptly and advantageously negotiating the same," the Norfolk & Western Co. agreed to guaranty, on certain specified conditions, the payment of interest on the bonds, which it was agreed should not be sold at less than 60 per cent of their par value, payable in cash or obligations of the first-mentioned company, including mortgage coupons maturing in 1883 and 1884. The mortgage was accordingly executed on the 12th of February, 1883, and it set forth the object of the issue of the bonds secured by it, the terms and conditions upon which they were issued, and also the substance of the agreement aforesaid, as did the bonds themselves. The appellants, Clark & Kimball, thus had, independently of their official connection with the company, full notice of the objects for which the bonds purchased and now held by them were issued, and it is not reasonable to suppose that in surrendering their coupons at par and getting for them, at 60 cents on the dollar, income bonds secured and guarantied as already indicated, they were merely exchanging one form of indebtedness for another, leaving the original indebtedness, evidenced by the coupons, unaffected. On the contrary, the circumstances of the transaction preclude any such conclusion. Here, not only was the original security given up, but a new one was taken, secured not only on the property of the debtor, but guarantied, to a certain extent, by a third and solvent party, and the new security reciting, what was known before, that it was issued to pay the floating and accruing indebtedness of the company, a large portion of which indebtedness was used at par in purchasing the bonds at only a little over one-half of their nominal value. In addition to this, the coupons, when turned into the company, were cancelled, and the transaction was treated, as in effect it was, an extinguishment of

the coupons. And that such was the intention of the parties at the time hardly admits of doubt.

Besides, if this be not the true view of the matter, the appellants must, upon the plainest principles of equity, be held to have waived the claim now asserted by them. In a printed statement to the New York Stock Exchange, dated May 31, 1883, accompanying their application to have the mortgage bonds of the company, including the income bonds, "listed," as it is called, statements were made by the officers of the company as to the financial condition of the company which are utterly at war with the claims now asserted. At that time Kimball, one of the appellants, was the president of the company, and Clark, the other appellant, was one of its directors. Upon the strength of these representations sales of the bonds were no doubt effected to innocent purchasers, and it would now be the grossest injustice to such persons to allow the claims in question as a preferred charge on the mortgage property, and thereby to that extent to impair the security of the mortgages. Plainly, upon no just principle can this be done.

Waiver of
claim to ben-
efit of lien of
first mortgage
bond coupons.

A decisive authority upon this point is *Addison v. Lewis*, 75 Va. 701. There the president of the railroad company intervened, and asserted a claim for several years' salary, which accrued before the road went into the hands of a receiver. But, as it appeared that in his published annual reports, as president, for the years in question, his salary for those years was put among the paid items, it was held that any right which he might have had to be paid in preference to the bondholders had been waived, although the salary in point of fact had not been paid. This ruling, it seems to us, is eminently just and proper, and in accordance with public policy, inasmuch as the officers of a railroad company are, in a general sense, trustees, and must therefore act in the strictest good faith in putting forth statements to the public as to the condition of the affairs of the company, upon which innocent persons, in their dealings with the company, have a right to rely. The same considerations apply to the promissory notes in question, and as to which the appellants claim the right of subrogation. But enough has been already said to show that this is not a proper case for the application of that doctrine. "The law of subrogation is the exercise of the equitable powers of the court, to afford a summary relief to a meritorious creditor, who might otherwise be subjected to loss by the operation of proceedings at law against the estate or funds of one who is indebted both to him and to others. This equitable remedy is allowed only when it does not conflict with the legal or equitable rights of other creditors of the common debtor." "It is the creature of equity, and justice is its object.

It is founded upon principles of equity and benevolence, and is only to be administered in a clear case, and never to the prejudice of the rights of others." *Sheld. Subr.* § 4; *Enders v. Brune*, 4 *Rand. (Va.)* 438; *Clevinger v. Miller*, 27 *Grat. (Va.)* 740; *Miller v. Holland*, 5 *S. E. Rep.* 701; 3 *Pom. Eq. Jur.* § 1419, note 1. Besides, there is no proof that when the money was loaned, for which the notes were given, there was any understanding as to how it should be applied. The company at the time was financially embarrassed, and the loans were simply made in the ordinary course of business. The lenders were pecuniarily interested in the road, and no doubt were influenced thereby in loaning the money, but with no agreement that any particular claims or class of claims should be paid with it. Indeed, Kimball himself, one of the appellants, testifies explicitly in his deposition that the money was advanced without any special agreement, written or verbal, so that it went into the treasury of the company unaffected by any special equities of the appellants, and when, afterwards, a part of it was paid out to laborers and supply-men, the debts so paid were forever discharged. It appears, moreover, that when the notes for the loans were taken the appellants received general mortgage bonds of the company as collateral security for their payment, which goes far to show, if it does not conclusively show, that the idea of a right to subrogation is altogether an afterthought. For why take general or second mortgage bonds as collateral if the understanding was that the appellants were to stand in the shoes of those whose equities were superior even to the first mortgage? To this question the answer must be that the money was loaned on the credit of the company and the collaterals so furnished, alone. At all events, such is the fair presumption, and there is no evidence to repel it.

In *Addison v. Lewis*, *supra*, a similar claim was asserted on the part of a bank for money advanced by it on collaterals, before the appointment of a receiver, and which was used by the railroad company in paying current expenses. The claim, however, was rejected. The court said: "The bank discounted the paper of the company solely upon the credit of the company, and upon collaterals deposited by the company with the bank. The acceptance of these collaterals was in itself a recognition of the subordination of the claim of the bank to the lien of the bondholders, and is sufficient to estop the bank from setting up the claim preferred in the petition." The cases of *Coe v. New Jersey Midland R. Co.*, 31 *N. J. Eq.* 105, and *Atkins v. Petersburg R. Co.*, 3 *Hughes (U. S.)*, 307, relied on by the appellants, are not in point, as in both of those cases the advancements were made on a distinct understanding, clearly established, that the parties by whom they were made should be subrogated to the

rights of the creditors whose debts were paid with the money advanced. In short, we are of the opinion that the claim of the appellants Messrs. Clark & Kimball to superior equities to the bondholders cannot be sustained; that they are entitled, as to the income bonds held by them, to the security of the income mortgage only; and that so much of the decree of the circuit court as is in conflict with this opinion must be reversed and annulled.

Rule in Fosdick v. Schall—Payment of Current Expenses from Earnings During Receivership.—The rules governing payment of current expenses from the income derived by the receiver from the operation of a railroad, as laid down by the supreme court of the United States in *Fosdick v. Schall*, 99 U. S. 235, have thus been summarized by Harlan, J., in *Thomas v. Peoria & R. I. R. Co.*, 36 Am. & Eng. R. Cas. 381: “(1) When a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment, from the income during the receivership, of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable. (2) As it frequently happens, when a railroad company becomes pecuniarily embarrassed, that debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided, and as in this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt, the presumption is that every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. Consequently the income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. (3) If anything is taken from the current debt fund, and put into that which belongs to the mortgage creditors, the court may require, as a condition of an order to take possession of the mortgaged property and hold the future income for the mortgagees, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees, notwithstanding the mortgage, may, in terms, give a lien upon the profits and income; for, until possession of the mortgaged premises is actually taken, or something equivalent done, the whole earnings belong to the company, and are subject to its control. (4) So, also, if no order is made, when a receiver is appointed, that will, in terms, save the rights of creditors furnishing supplies, equipment, labor, etc., if it appear, in the progress of the cause, that bonded interest has been paid, additional equipment provided, or lasting or valuable improvements made, out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business; because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and, if they give to one class of creditors that which properly

belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its hands as, if practicable, to restore the parties to their original equitable rights. (5) While ordinarily this power is confined to the appropriation of the income of the receivership, and the proceeds of mortgaged assets that have been taken from the company, cases may arise that will require the use of the proceeds of the sale of the mortgaged property in the same way; as when, before the appointment of the receiver, or in the administration of the cause, income applicable to the payment of old debts for current expenses is taken and used to make permanent improvements in the fixed property, or to buy additional equipment."

Same—Application of Principle to Corporations other than Railroad Companies.—In *Wood v. Guarantee, Trust & Safe Deposit Co.*, 128 U. S. 416, a case involving a claim for materials used in the construction of water-works, it was pointed out that the doctrine of *Fosdick v. Schall*, 99 U. S. 235, had never been applied in any case except that of a railroad, and that the opinion in that case laid great emphasis on the consideration that a railroad is a peculiar property of a public nature, and discharging a great public work, and therefore to be distinguished from a purely private concern. But in *Reyburn v. Consumers' Gas, Fuel & Light Co.*, 29 Fed. Rep. 561, Blodgett, J., treated the doctrine of *Fosdick v. Schall*, *supra*, as applicable to claims against a gas company, but held that a claim for meters for use by the consumers of gas, is a claim for materials used in the construction, and therefore is not within the principal of *Fosdick v. Schall*.

Same—Diversion of "Current Debt Fund" to Other Purposes.—When the current earnings of a railroad which ought in equity to have been employed to pay current debts contracted before the receiver's appointment for labor, supplies and the like, have been applied by the company to the payment of interest due mortgage creditors, or to pay for additional equipments for the road, or for valuable and lasting improvements, it is competent for the court to restore what has thus been improperly diverted, and to direct such current debts to be paid out of the income in the receiver's hands before anything derived from that source goes to the mortgage creditors. *Addison v. Lewis* (Va.), 9 Am. & Eng. R. Cas. 702; *Burnham v. Bowen* (U. S.), 17 Am. & Eng. R. Cas. 308; *Calhoun v. St. Louis & S. E. R. Co.*, 14 Fed. Rep. 9. And payment of the current debts may, if necessary, be enforced by the sale of the property. *Burnham v. Bowen* (U. S.), 17 Am. & Eng. R. Cas. 308. When the court has, in appointing a receiver, ordered the payment from the income during receivership of outstanding debts for labor supplies, and equipment accruing during a specified period prior to his appointment, the receiver cannot, with the assent of the bondholders, apply the surplus income to the purchase of additional grounds, rolling-stock, etc., and to the making of permanent improvements. If he do so, the supply creditors are entitled to payment from the sum realized on sale under order of foreclosure of the amount of their claims. *Union Trust Co. v. Souther* (U. S.), 11 Am. & Eng. R. Cas. 707.

Same—Receiver's Operating Expenses.—The operating expenses of receivers of railroads are payable out of income in priority to the claims of bondholders. *Langdon v. Vermont & C. R. Co.* (Vt.), 11 Am. & Eng. R. Cas. 688. Such expenses include reasonable fees for counsel employed by the receiver to aid him in the proper discharge of his trust, the cost of litigation, and expenses incurred in taking care of, protecting, and repairing the property in his charge. *McLane v. Placerville & S. V. R. Co.* (Cal.), 26 Am. & Eng. R. Cas. 404. Items for wages due employees of receivers; debts incurred for necessary repairs, debts due from receivers to other railroad companies, and for supplies and damages, and debts in-

curred by the receiver for the ordinary expenses of operating the road, will be allowed priority out of the *corpus* of the property if the current debt fund has been diverted by the receivers to other purposes. *Union Trust Co. v. Illinois M. R. Co.* (U. S.), 25 Am. & Eng. R. Cas. 560.

The receiver of a railway may be authorized to make repairs, the expenses to be charged as a lien prior to existing mortgages. *Hoover v. Montclair & G. I. R. Co.*, 29 N. J. Eq. 4.

In *Frank v. Denver & R. G. R. Co.*, 23 Fed. Rep. 123, the court held that where the payment for rolling-stock purchased by the receiver so absorbed the earnings of the road that the receiver was unable to execute the orders of the court relating to demands for labor and supplies, payment of the principal sums falling due under the rolling-stock contracts ought to be postponed until the demands for labor and supplies had been satisfied, but that the interest thereon should be paid as it matured.

Damages for injuries to persons or property are included within the expenses of operating a railroad while in the hands of a receiver, and are payable from its earnings. *Mobile & O. R. Co. v. Davis* (Miss.), 26 Am. & Eng. R. Cas. 425. See also *Ryan v. Hays* (Tex.), 23 Am. & Eng. R. Cas. 501.

Same—Operating Expenses Prior to Receiver's Appointment.—The claim to priority is not necessarily limited to items accruing after the appointment of the receiver. *Miltenerberger v. Logansport R. Co.* (U. S.), 12 Am. & Eng. R. Cas. 464; *Union Trust Co. v. Illinois M. R. Co.* (U. S.), 25 Ib. 560; *Thomas v. Peoria & R. I. R. Co.* (C. C.), 36 Ib. 381. In *Miltenerberger v. Logansport R. Co.* (U. S.), 12 Ib. 464; *Blatchford, J.*, who delivered the opinion of the court said: "It cannot be affirmed that no items which accrued before the appointment of a receiver, can be allowed in any case. Many circumstances may exist which make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the *corpus* of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with a very great care. The payment of such debts stands *prima facie*, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of non-payment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien." But where the current expenses have exceeded the income of the road, the court cannot direct the payment of a claim for supplies incurred previous to the appointment of the receiver from the *corpus* of the property. *United States Trust Co. v. New York, W., S. & B. R. Co.*, 25 Fed Rep. 800.

Arrears of pay due by company to employees are entitled to priority out of the earning of the road in the receiver's hands. *Duncan v. Chesapeake & O. R. Co.*, 15 Am. L. Reg. (N. S.) 428; *Douglass v. Cline*, 12 Bush (Ky.), 608; *Calhoun v. St. Louis & S. E. R. Co.*, 14 Fed. Rep. 9.

Where the holders of mortgage bonds obtain the appointment of a receiver pending proceedings of foreclosure, the court will apply the net income, in its discretion, to the payment of employees and materialmen who have furnished labor, materials, and supplies necessary for the operation of the road. *Taylor v. Philadelphia & R. R. Co.*, 7 Fed. Rep. 377. And in *Dow v. Memphis & L. R. Co.*, 20 Fed. Rep. 260, the court, in appointing a receiver, deemed it proper that the order should provide that the debts, if any, due from the railroad company for ticket and freight balances, and for work and labor performed by its employees and laborers, and for supplies and materials furnished for equipping, operating, repairing or improving the road, and all obligations incurred in the transportation of passengers and freight, or for injuries to personal property which had accrued within six months, should be paid by the receiver out of the earnings of the road.

Claims for supplies furnished prior to the appointment of a receiver are payable from the income. *Calhoun v. St. Louis & S. E. R. Co.*, 14 Fed. Rep. 9. A claim for oil sold to a railroad company for use in operating the road is a current expense and payable from the income. *Poland v. Lamoille Val. R. Co. (Vt.)*, 4 Am. & Eng. R. Cas. 408. So too is a debt incurred for coal supplied to the company for use in its locomotives. *Burnham v. Bowen (U. S.)*, 17 Ib. 308. A claim for new iron rails and cross-ties required for the purpose of keeping the road in a condition safe and fit for travel is payable from the net revenues of the road in preference to mortgage bondholders. *Williamson's Adm'r v. Washington City, V. M. & G. S. R. Co. (Va.)*, 1 Am. & Eng. R. Cas. 498. And where supplies used for rebuilding bridges, building side tracks, and making repairs were furnished from time to time under a continuous verbal contract made after default in the company's bonded interest, which was not terminated until the appointment of a receiver more than two years after the first supplies were furnished, it was held that the materialmen were, under the circumstances, entitled to demand the balance due them and to a lien superior to that of the mortgage creditors, for the amount due on the earnings of the road. *Blair v. St. Louis, H. & K. R. Co.*, 22 Fed. Rep. 769.

Where a contract to sell cars to a railroad company is made, and the title is retained until the instalments of the price have been paid, the vendor is not entitled to claim payment of the instalments becoming due after the appointment of a receiver from the current debt fund. *Fosdick v. Schall*, 99 U. S. 235. So where locomotive engines were sold and delivered to a railroad company, notes to be given for the price, and the title to remain in the vendor until the notes should be paid, and the receiver of the company subsequently surrendered them to the vendor, the amount due for their use and injured condition when returned is on the same basis as a balance due upon the foreclosure of the vendor's lien, and he is not entitled to payment thereof from the earnings of the road in priority to the bondholders. *Huidekoper v. Hinckley Locomotive Works*, 99 U. S. 258.

The rentals of cars leased by the company are "current expenses" chargeable upon the "current debt fund." *Thomas v. Peoria & R. I. R. Co. (C. C.)*, 35 Am. & Eng. R. Cas. 381.

It has been held that claims against the company for injuries to persons, whether passengers or employees, are current expenses, and payable from the income of the road. *Ex parte Brown (S. Car.)*, 9 Am. & Eng. R. Cas. 723. But in *Hiles v. Case*, 14 Fed. Rep. 141, it was held that a claim for damages for the destruction of property by fire escaping from a defective locomotive was not part of the operating expenses of the road, and therefore should not be ordered to be paid out of the net earnings in the hands

of the receiver. See also *In re Dexterville Mfg. & Boom Co.*, 4 Fed. Rep. 873.

So long as the lessee of a railroad pays the rental to the lessor, the former is at liberty to apply a surplus arising from the operation of the leased road to the improvement of its own track; and because it has done so, the lessee cannot claim a priority for rents subsequently becoming due and left unpaid. And where the evidence shows that the amount expended by the lessor for operating-expenses of the leased road, and the sum paid on account of rent, exceeds the gross earnings of the leased road, there is no room for any claim by the lessee on the ground that the lessor has failed to apply the earnings of the leased road to current expenses. *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co.* (U. S.), 33 Am. & Eng. R. Cas. 16. When by the terms of the lease, the lessee agrees to pay a minimum rent, and in the event of the gross earnings exceeding a special sum a percentage thereof, such agreement does not give the lessor any prior right to the payment of the percentage from the earnings of the leased road when the sums paid on account of the rent, and for operating expenses, already exceed the gross earnings of the leased line. *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co.* (U. S.), 33 Ib. 16.

A bank which has discounted paper for a railroad company, and received bonds secured by trust as collateral therefor, is in the position of a general creditor, and cannot claim payment of the amount due it from the income of the railroad merely because the moneys advanced by it were applied to the payment of necessary current expenses. *Addison v. Lewis* (Va.), 9 Am. & Eng. R. Cas. 702.

When, at the time of the appointment of a receiver, executions have been placed in the hands of the sheriff, and there are funds derived from income and balances due from employees in the hands of or due to the company, the execution creditors are entitled to have these funds applied to the satisfaction of their debts in preference to trust or mortgage creditors; and if the funds have been applied under the order of the court to other debts, they will be replaced out of the revenues received by the receiver since his appointment. *Gibert v. Washington City, V. M. & G. S. R. Co.* (Va.), 1 Am. & Eng. R. Cas. 512.

Where a person at the request of a railroad company becomes surety upon a bond to enjoin the collection of a judgment on the ground that it was fraudulently obtained, and the suit having been dismissed such surety pays the amount of the judgment, he is entitled to be paid out of the *corpus* of the mortgaged property in priority to the bondholders if the bond in the injunction suit was given for the purpose of preventing a levy upon property necessary for the operation of the railroad. *Union Trust Co. v. Morrison* (U. S.), 33 Am. & Eng. R. Cas. 33.

Same—Principle Applicable to Operating-expenses only.—In *Wood v. Guarantee, Trust & Safe Deposit Co.*, 128 U. S. 416, it was pointed out that the doctrine of *Fosdick v. Schall* applied to operating expenses only, and not to a debt contracted in the ordinary construction of the road. And it has been held that the claim of contractors for the construction of the road or an extension thereof is simply a general debt, which will not be preferred to the claim of bondholders. *Addison v. Lewis* (Va.), 9 Am. & Eng. R. Cas. 702.

Same—Limit of Time within which Company's Operating-expenses Must have been Incurred.—There is no definite rule as to the period prior to the appointment of the receiver within which the operating-expenses must have been incurred, and each case must depend upon the discretion of the chancellor. *Taylor v. Philadelphia & R. R. Co.*, 7 Fed. Rep. 377.

In the seventh circuit, the circuit judge has limited the debts for operating and current expenses which have priority upon the "current

debt fund," to claims which have accrued within the six months previous to the appointment of a receiver. *Thomas v. Peoria & R. I. R. Co.* (C. C.), 36 Am. & Eng. R. Cas. 381. Harlan, J., in so ruling, said: "It would not do to charge the income of mortgaged railroad property, managed by a receiver, or the property itself, with every debt incurred in all its previous history for labor, supplies, or equipment. As was said in *Fosdick v. Schall*, the business of all railroad companies is, to a greater or less extent, done on credit. Those who perform labor or furnish supplies and equipment usually expect and contract to be paid within a reasonable time; and they do not ordinarily perform labor or furnish supplies or equipment after the railroad company has failed to pay within such time for what has been previously done or furnished. Expenses incurred within such reasonable time constitute what are called 'current expenses,' which ought, if possible, to be paid out of the receipts during the same period. When, therefore, debts of that character remain unsettled or are not put in suit for such a time as would be deemed unreasonable, it may be fairly presumed that the creditors have ceased to look to current receipts for payment, and have accepted the position of general creditors, who, as such, would have no claim for indemnity upon any special part of the income. Upon these grounds, substantially, rests the rule that recognizes the right of the court to charge the income earned during the receivership with obligations for labor, supplies, and equipment contracted by the railroad company during the six months immediately preceding the receivership. Such debts constitute operating-expenses incurred to the end that mortgage bondholders might be protected, and that the company might be kept upon its feet, and subserve the public purpose for which it was established, namely, the maintenance of a highway for the convenience of the people."

Claims for labor, material, etc., furnished for the operation of the road within five months previous to the appointment of a receiver have been allowed. *Taylor v. Philadelphia & R. R. Co.*, 7 Fed. Rep. 377. And in *Union Trust Co. v. Illinois, M. R. Co.* (U. S.), 25 Am. & Eng. R. Cas. 560, wages due employees of the road within six months immediately preceding the appointment of a receiver were allowed priority out of the *corpus* of the property, the income having been applied by the receiver to permanent improvements and betterments. *Union Trust Co. v. Illinois M. R. Co.* (U. S.), 25 Am. & Eng. R. Cas. 560.

In Canada it has been held that a receiver of a railroad company is authorized to pay debts incurred before his appointment, but not in the ordinary course payable until after his appointment, but that he is not entitled to pay any sums which at the time of his appointment were in the position of ordinary overdue debts. *Gooderham v. Toronto & N. R. Co.* (Ont.), 17 Am. & Eng. R. Cas. 339.

FIDELITY INSURANCE, TRUST, AND SAFE-DEPOSIT CO.

v.

SHENANDOAH VALLEY R. CO.

(West Virginia Supreme Court of Appeals, February 25, 1889.)

Contract of Corporation—Validity—Authority to affix Seal.—Where the contract of a corporation purports to be sealed with its corporate seal, and it is proven to be signed by the proper agents of the corporation, the presumption is that the seal was affixed by the proper authority, and such contract will be held valid until the contrary is shown.

Same—Presumption of Authority to affix Seal—Vote of Directors.—The presumption of authority to affix the corporate seal to a contract will not be overcome by the mere fact that no vote of the directors authorizing it is shown.

Mortgage—Notice to Trustee as Notice to Bondholder.—Notice to a trustee is notice to a *cestui que trust*; and this rule applies to trustees under an ordinary mortgage made by a railroad company to secure the holders of bonds issued under it.

Same—Constructive Notice to Purchaser.—Where a subsequent purchaser has actual notice that the property in question was encumbered or affected, he is charged constructively with notice of all the facts and instruments to the knowledge of which he would have been led by an inquiry into the encumbrance or other circumstance affecting the property of which he had notice.

Same—Entry of Satisfaction by Mortgagee after parting with Interest.—An entry of satisfaction by the mortgagee, after he had parted with his interest in the security, will not discharge the mortgage in favor of one who had acquired an interest in the land before the discharge was made.

Same—Surrender of Bonds—Conditions—Notice to Subsequent Mortgagee.—A mortgage is executed by a railroad company on its property to secure bonds to be issued thereunder, which provides that upon the full payment of all said bonds at maturity the trustee shall release the same. Before the maturity of the bonds, they are surrendered to the trustee, upon an agreement that other bonds to be issued under a subsequent mortgage are to be substituted for them. The trustee, without substituting such other bonds, executed a release of the mortgage, stating therein that all the bonds "had been surrendered." The railroad was not in a condition to anticipate the payment of its bonds, and had executed several mortgages to take up bonds issued under former mortgages. *Held*, these facts and circumstances were sufficient to charge a subsequent mortgagee with notice of the terms and conditions upon which the bonds under said released mortgage had been surrendered, and he takes subject to the rights of those entitled to the bonds under said agreement.

Same—Powers of Trustees.—The trustee can only do with the trust property what the deed, either in express terms or by necessary implication, authorizes him to do.

Same—Cancellation—Prima Facie Evidence of Discharge.—The cancellation of a mortgage on the record is only *prima facie* evidence of its dis-

charge, and the owner may prove that the cancellation was done by fraud, accident, or mistake; and if he does this, his rights will not be affected by the improper cancellation of it.

Same—Foreclosure—Suits in Different States—Claim of Lien.—Where the road of a railroad company passes into two states, in each of which it is a domestic corporation, and the trustee in a mortgage upon the whole road first brings a suit in one state to foreclose the mortgage, and afterwards brings an ancillary suit in the other state for the same purpose, the plaintiff in said suits cannot object to or prevent a lien creditor of the railroad company, who has not filed his claim in the first suit, from intervening in the second to establish his lien.

APPEAL from Circuit Court, Jefferson County.

McDonald & Moore and *D. B. Lucas* for appellants.

W. H. Travers, *W. J. Robertson*, *J. C. Bullitt*, *Geo. B. Caldwell*, and *Frank P. Clark* for appellees.

SNYDER, P.—Appeals from two decrees of the circuit court of Jefferson county—the one pronounced November 29, 1887, in the suit of *J. Garland Hurst*, administrator of *H. H. Crumlish*, deceased, suing on behalf of himself and all other stockholders of the *Central Improvement Co.*, against the *Shenandoah Valley R. Co.*; and the other pronounced September 11, 1888, in the suit of the *Fidelity Insurance, Trust & Safe-deposit Co.*, trustees, against the said *Shenandoah Valley R. Co.* As the record is voluminous and the facts complicated, an understanding of the questions to be determined may be facilitated by first giving a brief statement of some of the prominent facts appearing in the record.

Facts. The *Shenandoah Valley R. Co.* was organized in May, 1870, under acts of the legislatures of the states of Virginia, West Virginia, and Maryland, for the purpose of constructing and operating a railroad; and the road, as constructed by it, now extends from Hagerstown, in the state of Maryland, through Jefferson county, in West Virginia, to the city of Roanoke, in the state of Virginia. The *Central Improvement Co.* was organized in July, 1870, under an act of the legislature of the state of Pennsylvania passed April 9, 1870, for the purpose of constructing any work, public or private, and for other purposes. Three written contracts were entered into between the improvement and said railroad companies, designated as contracts Nos. 1, 2, and 3. No. 1, dated August 9, 1870, was for the construction of the railroad by said improvement company from Shepherdstown to Big Lick (now Roanoke city), a distance of 233 miles, the work to be completed by August 10, 1872, at the price of \$35,000 per mile of track laid, payable in first and second mortgage bonds of the said railroad company, and certain county bonds, as the work progressed. No. 2, dated August 1, 1872, was practically a substitute for No. 1, and provided for the construction of the rail-

road from Shepherdstown to Waynesboro, a distance of only 140 miles, and fixed October 1, 1874, as the time for the completion of the work. No. 3, dated April 23, 1873, was supplemental to contract No. 2, and conferred upon the improvement company the power to vote a large amount of the stock of said railroad company. On October 15, 1872, the said railroad company executed to J. Edgar Thompson, trustee, a first mortgage on its road and franchises between Shepherdstown and Waynesboro, to secure \$3,750,000 of first mortgage 7 per cent gold bonds, being \$25,000 per mile of the road. During the month of September, 1873, \$781,000 of these bonds were issued and delivered to said improvement company on account of its contracts for the construction of said railroad; and of these bonds \$250,000 were subsequently delivered by the improvement company to the Pennsylvania R. Co. as collateral security for loans made by the latter to the improvement company; leaving in the hands of the improvement company the balance of \$531,000 of said bonds. On January 7, 1873, a resolution was passed by the stockholders of the improvement company authorizing its president and treasurer to dispose of the securities receivable under its contract with the said railroad company. Work on the railroad was abandoned by the improvement company in the fall of 1873, and never afterwards resumed by it. Jefferson county, on behalf of itself and the other stockholders of the Shenandoah Valley R. Co., in April, 1874, filed its bill in the circuit court of Clarke county, Va., to set aside the aforesaid contracts, Nos. 1, 2, and 3, between the said railroad company and the improvement company. A final decree was entered in this suit on December 8, 1874, whereby said contracts Nos. 2 and 3 were set aside and declared void, but the court refused to set aside contract No. 1. In December, 1876, an attachment suit in equity was brought in the circuit court of Warren county, Va., by J. T. Griffith, suing in the name of H. H. Crumlish for his use, against the Central Improvement Co. and the Shenandoah Valley R. Co., to attach whatever stock might be held by the improvement company in the said railroad company, and any indebtedness due from the latter to the former, to satisfy a debt due to the plaintiff from the said improvement company on account of work done for the latter in the construction of said railroad. The suit was afterwards transferred to the circuit court of Clarke county, and referred to a commissioner, who made a report holding that the \$781,000 of bonds aforesaid had been delivered by the railroad company to the improvement company under the said contracts Nos. 2 and 3, which had been set aside and declared void in the aforesaid Jefferson county suit, and that the said delivery was void. In December, 1878, an amended bill was filed by Griffith, in which he averred that

the said bonds had been delivered under said contract No. 2, which had been declared void, and consequently the said delivery was without authority and void, and the debt which these bonds had been transferred to pay was still a subsisting debt due from the said railroad company to the improvement company, and liable to the plaintiff's attachment. In January, 1880, Griffith, on behalf of himself and the other creditors of the improvement company who had by petition made themselves plaintiffs, filed a petition in the suit, in which it is averred "that all these bonds thus issued (\$781,000) have been returned and cancelled, and the mortgage securing them has been released, and they have been substituted by a like number of bonds issued under a second mortgage, recorded, for \$15,000 per mile.

On May 18, 1880, the court entered a decree in favor of the plaintiff, Griffith, against the Central Improvement Co., for \$8826.33, and ordered the sale of 5000 shares of stock of the Shenandoah Valley R. Co., held by the improvement company at the time the attachment was sued out by Griffith, to pay said sum; and the court being of opinion that the improvement company had, subject to the lien of the attachment of Griffith and before the filing of the petition and amended bill making the general creditors parties, made a valid assignment of the said stock to the Pennsylvania R. Co., it denied the relief prayed for by the general creditors; and the amended bill, so far as it asked relief in their behalf, was dismissed. From this decree, and other decrees subsequently rendered in other suits heard with this suit, an appeal was taken to the supreme court of appeals of Virginia, and the said decree of May 18, 1880, was affirmed. *Shenandoah Val. R. Co. v. Griffith*, 76 Va. 913, 13 Am. & Eng. R. Cas., 120. By an agreement dated April 29, 1878, the said improvement company agreed to surrender to the said railroad company all the first mortgage bonds held by it, upon the terms set forth in said agreement. On January 1, 1879, the said railroad company executed a mortgage on its railroad and franchises to the Farmers' Loan and Trust Co. to secure \$2,250,000 of first mortgage bonds. On August 25, 1878, W. H. Travers, as substituted trustee, in the aforesaid mortgage of October 15, 1872, executed a release of said mortgage. The railroad company, by a mortgage dated July 1, 1871, but which was in fact executed in September, 1879, and recorded October 6, 1879, conveyed its road and franchises to W. H. Travers, trustee, to secure \$1,500,000 of second mortgage bonds; being \$10,000 per mile on its road from Shepherdstown to Waynesboro. On April 1, 1880, the railroad company executed a mortgage to the plaintiff, the Fidelity Insurance, Trust & Safe-deposit Co., trustee, on all its property, to secure first mortgage bonds to be issued at the rate of \$15,000 per mile of com-

pleted road, and \$10,000 of bonds additional for each mile of double track. On the next day, April 2, 1880, the said railroad company executed to the same trustee, on all its property, another mortgage, to secure second mortgage bonds at the rate of \$10,000 per mile of its road. On April 5, 1881, the said railroad company executed to the same trustee another mortgage, known as the "General Mortgage," to secure bonds to be issued at a rate not exceeding \$25,000 per mile of its road. By deed of release, dated July 30, 1881, the Fidelity Insurance, Trust & Safe-Deposit Co. released the aforesaid mortgage of April 2, 1880. The railroad company on February 12, 1883, executed another mortgage known as the "Income Mortgage," on all its property and the income of its road, to the defendant, the Fidelity Insurance, Trust & Safe-deposit Co., trustee, to secure \$2,500,000 of income bonds. It will be observed that of the aforesaid seven mortgages, all have been released except the three dated respectively, April 1, 1880, April 5, 1881, and February 12, 1883, to the Fidelity Insurance, Trust & Safe-deposit Co., trustee.

On December 1, 1882, the administrator of H. H. Crumlish, deceased, brought the first of these suits in the circuit court of Jefferson county. The bill alleges that the plaintiff, as administrator of Crumlish, was the owner and holder of two certificates of the paid-up stock of the Central Improvement Co. of 100 shares each, of the par value of \$50 per share; that the paid-up capital stock of said company was \$150,000; that the said company owes debts amounting to about \$300,000; that in a settlement made in the spring of 1874 it became the owner of \$781,000 of first mortgage bonds of the Shenandoah Valley R. Co., and is still the owner of \$531,000 of said bonds; that in the spring of 1879 these bonds, without the authority of said company, were destroyed, with the understanding they were to be substituted by other bonds to be issued under another mortgage; and, in order to prevent the issue and delivery of said substituted bonds to some unauthorized person, the plaintiff prayed an injunction to inhibit such issue, etc. A demurrer to this bill was sustained by the circuit court. An amended bill was filed in April, 1885, in which the plaintiff avers that since the filing of his original bill he has learned that the Shenandoah Valley R. Co. sets up a claim to said \$531,000 of bonds under an alleged agreement dated April 29, 1878, which is fraudulent and void, and that the mortgage of October 15, 1872, securing said bonds, has been improperly released, setting out the facts and grounds upon which the agreement is alleged to be void, and the said mortgage improperly released; and then praying that said agreement and release may be declared ineffectual and void, and the title of said improvement company to said bonds established, etc. A

demurrer to this bill was also sustained by the circuit court, but upon appeal to this court the demurrer was overruled, the bill sustained, and the cause remanded. *Crumlish v. Shenandoah Val. R. Co.*, 28 W. Va. 623. By a decree entered in the cause by the circuit court on November 29, 1887, it was decided that the aforesaid agreement of April 29, 1878, did not pass the title to said \$531,000 of first mortgage bonds from the improvement company to the Shenandoah Val. R. Co.; that the amount of the debt evidenced by said bonds is still due from said railroad company to said improvement company; and adjudged and decreed that said agreement of April 29, 1878, be declared void as between the said companies; and A. W. MacDonald was appointed receiver of the assets of the said improvement company, and leave given him to prosecute the claim of said company in the suit of the Fidelity Insurance, Trust & Safe-deposit Co. then pending in said court. From this decree the Shenandoah Val. R. Co. has appealed.

The Fidelity Insurance, Trust & Safe-deposit Co., trustee, on March 31, 1885, filed its bill against the Shenandoah Valley R. Co., in the circuit court of the city of Roanoke, in the state of Virginia, to foreclose the mortgage held by it as aforesaid; and on April 1, 1885, the said Fidelity Co., as trustee, filed its bill in the second of these suits, in the circuit court of Jefferson county, as ancillary to the foreclosure suit already brought in Roanoke city, as aforesaid; and Sidney F. Taylor was appointed receiver of said railroad, and its property, in each of said suits. In February, 1888, A. W. MacDonald, special receiver, filed his petition in this cause, exhibiting therewith the record of the aforesaid suit of *Crumlish's* administrator against the Shenandoah Valley R. Co., averring that he was a necessary party to the suit, by reason of the aforesaid decree of November 29, 1887, in the said *Crumlish* suit, appointing him receiver to prosecute the claim therein established in favor of the Central Improvement Co. against the Shenandoah Valley R. Co., which he represented to be the first lien on the property of said company. The said Fidelity Co. excepted to the filing of said petition, and demurred to the same, and, said exceptions and demurrer being overruled by the court, it filed its answer to said petition, and to the bill and amended bill in the said *Crumlish* suit. As defences in its answer, it denied the right of petitioner to exhibit the record in the *Crumlish* suit against it in this suit, because it was not a party to that suit; it denied the right of petitioner to intervene in this suit, because it is only an ancillary proceeding to the main suit which was then pending in the circuit court of the city of Roanoke, and insisted that the improvement company should assert its claim in that suit; it claims that on a settlement of accounts the

improvement company would be shown to be indebted to the Shenandoah Valley R. Co.; it pleads and relies on the said agreement of April 29, 1878, as a valid and binding contract between the improvement company and said railroad company; and it also pleads and relies on the laches of said improvement company as a bar and estoppel to its right to set up its alleged claim in this suit. The petitioner replied generally to this answer. The administrator of Crumlish having also filed his petition in this cause, he was also made a party, and the Fidelity Co. made substantially the same objections and answer thereto. On September 11, 1888, the circuit court pronounced a decree by which it was adjudged and decided that, as between the stockholders and creditors of the Central Improvement Co. and the Fidelity Insurance, Trust & Safe-deposit Co., trustee, representing the holders of the bonds issued under the said mortgages, dated respectively April 1, 1880, April 5, 1881, and February 12, 1883, the said Fidelity Co. was and is a purchaser for value without notice, and postponed the payment of the debt of said improvement company to the liens created by said mortgages. From this decree J. Garland Hurst, administrator of H. H. Crumlish, deceased, and A. W. MacDonald, special receiver for the Central Improvement Co., have appealed.

The first inquiry is whether or not the circuit court erred in the decree entered by it on November 29, 1887, in the first of these causes. It is contended by the appellant, the Shenandoah Valley R. Co., as well as by the Fidelity Co., that inasmuch as the contracts, Nos. 2 and 3, under which the first mortgage bonds claimed by the Improvement Co. were delivered or paid to it by the Shenandoah Valley R. Co., were set aside and declared void by the decree of December 8, 1874, of the circuit court of Clarke county in the suit of Jefferson county against said improvement company, the said company never had any right or title to said bonds. In the view I take of this cause, it is unnecessary to consider any matter connected with said Jefferson county suit. The record shows that at a meeting of the stockholders of the Central Improvement Co. held on January 2, 1873, the following resolution was adopted: "Resolved, that the president and treasurer of this company are hereby authorized and empowered to dispose of the securities receivable by this company under its contract with the Shenandoah Valley R. Co., on such terms as in their judgment may be to the best interests of this company." So far as the minutes of this company show, its stockholders had but three meetings after this resolution had been passed, and the last of these was held November 4, 1875. At neither of these meetings was the authority conferred by the aforesaid resolution revoked or withdrawn.

The records of the improvement company show that on April 29, 1878, and prior thereto, Phillip Collins was the duly elected and acting president of said company, and C. W. Mackeehan was secretary and treasurer. On said day the following agreement was executed :

"This agreement, made this 29th day of April, A. D. 1878, between the Shenandoah Valley R. Co., of the first part, and the Central Improvement Co. of the second part, witnesseth : Whereas, under certain contracts heretofore made with the Shenandoah Valley R. Co., the Central Improvement Co. agreed to build the said Shenandoah Valley R. from Shepherdstown, on the Potomac river, in the state of West Virginia, to a point of connection with the Chesapeake & Ohio R. near Staunton, Va., being a distance of about one hundred and thirty-three miles ; and whereas, under said contracts, a large amount of grading and masonry has been done on the first seventy-five miles of the line south of Shepherdstown ; and whereas, by reason of the financial panic of 1873, the further construction of said road had ceased up to this time, and it is now the desire of the Shenandoah Valley R. Co. and the Central Improvement Co. that the bonds and other securities of the Shenandoah Valley R. Co., heretofore paid to the Central Improvement Co., and by it pledged to other parties, shall be retired and canceled, in order that under a new contract with John Satterlee & Co. and Alfred Creveling and the Shenandoah Valley R. Co. may be carried out for the completion of said road to a connection with the Chesapeake & Ohio R., and in order that the said Central Improvement Co. be released from all liability under the contracts above mentioned : Now, therefore, this agreement witnesseth : *First.* That the securities heretofore deposited with the Pennsylvania R. Co. for the amount advanced to the Central Improvement Co. by the Pennsylvania R. Co. shall be surrendered by said Pennsylvania R. Co. to said Shenandoah Valley R. Co.; the Pennsylvania R. Co. agreeing to receive in exchange therefor, under the terms of an agreement already made between said companies, two hundred and fifty thousand dollars, of an issue of five hundred thousand dollars, six per cent currency second mortgage bonds of the Shenandoah Valley R. Co., subject to a prior lien of fifteen thousand dollars per mile of first mortgage six per cent. bonds, which second mortgage bonds the said Shenandoah Valley R. Co. agrees to deliver to the said Pennsylvania R. Co., under the terms of the agreement herein referred to. *Second.* The Central Improvement Co. agrees to deliver to the Shenandoah Valley R. Co. all the first mortgage bonds of the Shenandoah Valley R. Co. held by it, which were received under the contracts aforesaid. *Third.* The Shenandoah Valley R. Co. also agrees to

issue and deliver to the Central Improvement Co. two hundred and fifty thousand dollars of the second mortgage aforesaid, in full consideration for the delivery and cancellation of the securities referred to. *Fourth.* The Shenandoah Valley R. Co. also agrees to issue and deliver to the Central Improvement Co., in payment for the amount received by it from subscribers to its capital stock heretofore expended by said Central Improvement Co. in the gradation of the line above mentioned, the amount paid in on the capital stock of the Central Improvement Co., with interest amounting to the sum of ———, six per cent. currency income bonds of said Shenandoah Valley R.; said bonds to be taken at the rate of fifty cents on the dollar, to be subject only to the first and second mortgage bonds herein mentioned. Should the Central Improvement Co., or any of the holders of the above-mentioned income bonds paid out under the terms of this contract, elect to have said bonds converted into preferred stock of the Shenandoah Valley R. Co., then the Shenandoah Valley R. Co. agrees to issue said preferred stock upon the written request of the said Central Improvement Co. or the holders thereof. *Fifth.* The Shenandoah Valley R. Co. agrees to release the Central Improvement Co. from all damages arising from breach of contract above mentioned, and consents that the same shall be declared null and void. *Sixth.* The Central Improvement Co. hereby gives its full consent to the delivery by the Pennsylvania R. Co., and all other holders of securities herein mentioned, to the Shenandoah Valley R. Co., of the securities hereinbefore referred to, and held by the Pennsylvania R. Co. and others as collateral for advances made from time to time to said Central Improvement Co.

"In witness whereof the parties of the first and second part hereunto have affixed their seals, duly attested, day and year above written.

"WILLIAM MILNES, Jr.,

"Pres. Shen. Val. R. Co.

[Seal of Shenandoah Valley R. Co.]

"PHILLIP COLLINS,

"Pres. Central Improvement Co.

[Seal of Central Improvement Co.]

"Attest: C. W. MACKEEHAN, Secretary Central Improvement Co."

It is proven by C. W. Mackeehan, whose name is signed to said agreement, that Phillip Collins was at the time the president, and that he was the secretary and treasurer, and that he and Collins signed and affixed the seal of the company to said agreement for the purpose of executing it; that they fully understood the facts, and regarded the agreement as very satisfactory and beneficial to the im-

Authority to
execute agree-
ment.

provement company,—to use his language, they thought “that it was a godsend to the improvement company.” The records of the company do not show any other express authority to execute this agreement than the aforesaid resolution of January 7, 1873; nor is there any other evidence on the subject. The Shenandoah Valley R. Co. and the Fidelity Co. not only concede that this agreement was properly and legally executed, but insist that it is valid and binding upon both the Shenandoah Valley R. Co. and the improvement company. The only question, then, is whether or not the improvement company is bound by this agreement. It is claimed on behalf of this company that the aforesaid resolution authorized the president and treasurer to act for it, while this agreement is executed by the president, and attested by the secretary, and therefore it is not only not an exercise of the power conferred by the resolution, but it does not purport to be so, and in fact the officers who executed it did not intend to act under that resolution. It is proven that Mackeehan, at the time he executed the agreement, was both secretary and treasurer of the company, and that he did execute it as an officer of the company. In the face of this proof it is immaterial in what form he executed it. It would be extremely technical, and I think unwarrantable, to hold that a paper, duly signed and sealed by the proper officer, should be held invalid simply because he failed to properly add to his signature the proper title of his office, and especially when, as in this case, the officer held the two offices in the same company. Nor does it seem to me at all material that the agreement does not refer to the resolution, or that the officers did not intend to execute it under said resolution. The question is not what the officers believed or intended at the time, but what they did, and whether they acted within the authority conferred upon them; and these questions must be determined solely and entirely by the act or agreement itself.

The rule is well settled that, “if a contract purporting to be sealed with the seal of a corporation, and it is proven to be signed and executed by the proper agents, the presumption is that the seal was regularly affixed by the proper authority; and a contract under seal, executed by an agent within the scope of his appointed power, will be held valid and binding upon the corporation until evidence to the contrary has been introduced.” *Ang. & A. Corp. § 224*; *2 Mor. Priv. Corp. § 617*; *Smith v. Smith*, 62 Ill. 493, 497. “The presumption of authority to affix to the instrument the seal of the corporation will not be overcome by the mere fact that no vote of the directors authorizing it is shown, since it is often the case that large powers are executed by corporate officers with the tacit approval of the corporation.” 1

**Presumption
that seal af-
fixed by proper
authority.**

Wat. Corp. § 96; Northern Cent. R. Co. *v.* Bastian, 15 Md. 494.

It appears in proof that the stockholders of the improvement company had notice of this agreement as early as July, 1879, and that they acquiesced in it until the filing of the amended bill in this cause, in April, 1885. It is true, ^{Acquiescence to agreement.} the plaintiff in this suit avers in his bill that he did not know that said agreement had not been properly executed and honestly carried into effect until after he had filed his original bill, in December, 1882; but this did not relieve him from the responsibility of acquiescence in said agreement. He had notice of the existence of the agreement, and the means of determining its validity, and it was his duty to do so. It is therefore plain, under the authorities above cited, that, even if said agreement was executed without express authority from the stockholders or directors of the company, the plaintiff in this suit, as well as the improvement company, is estopped to question or deny the authority to execute it. *Trader v. Jarvis*, 23 W. Va. 108; *Field, Corp.* § 226; *Story, Ag.* § 255.

This agreement fully explains the condition of the improvement company, and the circumstances under which it was made; and, considering these circumstances, it seems to me that it was not only just, but liberal, in its provisions in favor of the improvement company. Its operative provisions deal with two subjects: First, the \$250,000 of bonds that had been placed with the Pennsylvania R. Co. as collateral security; and, second, the \$531,000 of bonds which still belonged to the improvement company. In respect to the latter, the improvement company agrees to deliver to the Shenandoah Valley R. Co. said \$331,000 of bonds, and the railroad company agrees, in consideration thereof, to issue and deliver to the improvement company \$250,000 of second mortgage bonds, out of a total issue of \$500,000, subject to a first mortgage of \$15,000 per mile, and also to issue and deliver to the improvement company income bonds at the rate of 50 cents on the dollar to an amount equal to the paid-up capital stock of said improvement company, subject to the lien of the aforesaid first and second mortgages, and also to release the improvement company from all damages arising from the breach of the contract on account of which said \$781,000 had been delivered to it. This is the whole purport and effect of said agreement, so far as it relates to said \$781,000 of bonds. Therefore, whatever may be the fate of the aforesaid contracts, Nos. 1, 2, and 3, and the defects in the title to the bonds originally delivered under the same, there can be no question in regard to the title of the improvement company as to the bonds which the railroad company bound itself to deliver to said company under the said agreement of April 29, 1878, provided the latter agreement is valid and enforceable. That it is a valid agreement, I think, for

the reasons and upon the authority hereinbefore given, there can be no question. But the improvement company contends that said agreement was executory, and that the railroad company has not only wholly failed to perform it, but that, by its subsequent acts and conveyances, it has entirely disabled itself to perform it or carry it into execution. Admitting that said agreement is executory, it does not necessarily follow that it would be inoperative, or that the railroad company, by its subsequent acts, has disabled itself to perform it, or respond in damages for its failure to do so. A simple judgment against the railroad company for damages would probably be worthless, and could not, perhaps, be considered as a sufficient remedy for its failure to perform said agreement.

The real question presented, therefore, it seems to me, is whether or not the railroad company has so disabled itself or changed its condition that, on account of the intervening rights of others, there can be neither a specific execution of said agreement in equity, or substantial compensation compelled for the failure to perform it; and the solution of this question depends upon whether or not the Fidelity Co., as trustee in the three subsisting mortgages executed to it by the railroad company, is a purchaser for value, without notice, of the claim or rights of the improvement company. We shall therefore proceed to consider that question.

It is a well-settled principle of law, and especially in this state and in Virginia, that notice to a trustee is notice to his *cestui que trust*. *Beverly v. Brooke*, 2 Leigh (Va.), 446; *French v. Loyal Co.*, 5 Leigh (Va.), 641; *Le Neve v. Le*

Notice to trustee is notice to cestui que trust.

Neve, 2 Lead. Cas. Eq. 132, 145. In these states a trustee is always treated as a purchaser for value. *Wickham v. Lewis*, 13 Grat. (Va.) 430; *Western Min. Mfg. Co. v. Peytona C. Coal Co.*, 8 W. Va. 409. "Notice to

trustees under an ordinary mortgage deed of a railroad company is notice to the holders of the bonds secured by the mortgage. Such trustees are considered in the light of agents for the negotiating of the loan. They act for those who lend their money on the security of the mortgage. They are charged with the duty of protecting the interests of the bondholders, who are unconnected individuals, having no ready means of acting together except through trustees whom the law appoints to act for them. Notice to the trustees is held to affect the title in their hands with reference to encumbrances upon the trust property. Actual notice to the trustees of a prior equitable mortgage is notice of it to the bondholders, who therefore take their bonds subject to the legal consequences of the encumbrance." *Jones, Ry. Sec.* § 363; *Pierce v. Emery*, 32 N. H. 484, 521; *Miller v. Rutland & W. R. Co.*, 36 Vt. 452.

What is sufficient to put a person on inquiry is considered as conveying notice, for the law imputes a personal knowledge of a fact of which the exercise of common prudence might have apprised him. When a subsequent purchaser has actual notice that the property in question was encumbered or affected, he is charged constructively with notice of all the facts and instruments to the knowledge of which he would have been led by an inquiry into the encumbrance or other circumstance affecting the property of which he had notice. 2 Minor, Inst. 889; 2 Bart. Ch. Pr. 1006; Booth v. Barnum, 9 Conn. 286.

Effect of notice that property was encumbered.

The first mortgage executed to the Fidelity Co. is dated April 1, 1880, and was recorded on April 7, 1880. At the latter date the records of Jefferson county showed the following facts in respect to the Shenandoah Valley R. property: (1) The mortgage to J. Edgar Thompson, trustee, dated October 15, 1872; (2) the mortgage to the Farmers' Loan & Trust Co., trustee, dated January 1, 1879; (3) the deed releasing the aforesaid mortgage to J. Edgar Thompson, executed by W. H. Travers, as substituted trustee, and dated August 25, 1879; and (4) the mortgage to W. H. Travers, trustee, dated July 1, 1871, but not delivered until September 1879. At the time the mortgage of January 1, 1879, to the Farmers' Loan and Trust Co. was executed and recorded, the mortgage of October 15, 1872, had not been released, and, as a legal consequence, the Farmers' Loan & Trust Co. held subject to the lien of said mortgage; for it is a well-recognized and sound principle of law that an entry of satisfaction by the mortgagee, after he has parted with his interest in the security, will not discharge the mortgage in favor of one who had acquired an interest in the land before the discharge was made. Such person is no worse off than he supposed himself to be when he acquired his interest; and there is no reason in equity why the person really entitled to the mortgage should not have the benefit of it, so far as he is concerned. 2 Jones, Mortg. § 957, and cases cited. But this is not all. The said mortgage of January 1, 1879, contains the following provision: "Resolved, that it is the judgment of the president and directors of the Shenandoah Valley R. Co. that the bonds authorized and directed to be issued by the president and board of directors on the 12th day of October, 1872, . . . be reduced to the sum of \$2,250,000, . . . and that said bonds be secured by a first mortgage, . . . to be executed and delivered to the Farmers' Loan & Trust Co." Thus we have an express declaration upon the face of this mortgage that the bonds to be issued under it are to take up and secure the bonds which had been issued under the said mortgage of October 15, 1872. The recordation of this mortgage was notice of this fact, not only to the Farmers' Loan

& Trust Co., the trustee therein, but to W. H. Travers, trustee in the deed of September, 1879, and the Fidelity Co., as trustee in the subsequent mortgages on the same property. *Tysen v. Wabash, St. L. & P. R. Co.*, 13 Am. & Eng. R. Cas. 134, and cases cited in note p. 138. In the mortgage to W. H. Travers, trustee, dated July 1, 1871, but not delivered until September, 1879, is this recital: "And be it further resolved, that the following indorsement, to be signed by the president and secretary, be made upon the bonds: 'This bond, and the mortgage to secure the payment of the same, although dated the first day of July, 1871, were not actually delivered until after the making and issuing of a series of bonds of the Shenandoah Valley R. Co., amounting to \$2,250,000, dated January 1, 1879, and secured by a first mortgage upon the property and franchises of the Shenandoah Valley R. Co., of even date therewith, and duly recorded, which bonds and mortgage of January 1, 1879, were issued in substitution of the bonds and mortgage dated October 15, 1872; and the mortgage to secure the payment of this bond is subject to the said first mortgage on January 1, 1879.'" This recital of record, as a part of this mortgage, was notice, not only to W. H. Travers, the trustee therein, but to the Fidelity Co., and all other subsequent mortgagees or purchasers, that both this mortgage and the aforesaid mortgage of January 1, 1879, were made subject to, and in part for the purpose of taking up, the bonds issued under the prior mortgages of October 15, 1872, by the substitution of the bonds to be issued under it for the bonds secured by said mortgage of October 15, 1872. The mortgage of April 1, 1880, executed to the appellee, the Fidelity Co., as trustee, contains the following recital: "And it is further resolved, that the board of directors be and they are hereby fully authorized and empowered to negotiate with, and make such contracts or agreements with, the bondholders secured under the said mortgage of January 1, 1879, and the trustees thereof, with the bondholders secured under the second mortgage of July 1, 1871; and the trustee thereof, and with the holders of the different bonds, and with other creditors of and claimants against the company, or with either or any of them, upon such terms and conditions as the board of directors may deem proper, for the purpose of retiring and cancelling the bonds issued under the said mortgages, and obtaining a satisfaction and release of said mortgages, and retiring and cancelling the different bonds and other indebtedness of the company, or for any of these purposes, and to make, execute, and deliver such instrument or instruments in writing as may be deemed expedient to effect these or any of these purposes. And it is further resolved, that for the purpose of retiring and cancelling the bonds issued under the security of the second mortgage, dated July 1,

1871, and obtaining a satisfaction and release of the same for the purpose of retiring any other bonds now issued and outstanding, and to settle other indebtedness of the company, or for any of these purposes, if in the opinion of the board of directors it should be deemed advisable so to do, and for the purpose of enabling the company to increase the facilities for a speedy completion of the road, and affecting the purposes of its incorporation, the board of directors are fully authorized and empowered, and have and hereby are given the consent of the stockholders of this company, to create, issue, and negotiate the certificates of loans or bonds of this company, coupon or otherwise. . . . And provided, further, that the first bonds issued under this resolution shall be used by the trustees for the purpose of exchanging the same with and cancelling the bonds issued, and which may hereafter be issued, under the said first mortgage of January 1, 1879, to the Farmers' Loan & Trust Co. of New York."

These recitals declare distinctly, not only that the bonds to be issued under this mortgage are, so far as may be necessary for the purpose, to be substituted for and used to cancel and retire the bonds theretofore issued under the said mortgages of January 1, 1879, and July 1, 1871 (September, 1879), but "for the purpose of retiring any other bonds now issued and outstanding, and to settle other indebtedness of the company;" and "that the first bonds issued under this resolution [mortgage] shall be used by the trustees for the purpose of exchanging the same with and cancelling the bonds issued, and *which may hereafter be issued*, under the said mortgage of Jan. 1, 1879." This deed was recorded on April 7, 1880, while the deed releasing the aforesaid mortgage of January 1, 1879, was not recorded until November 24, 1880, more than seven months thereafter. This fact makes the above italicised words, "which may hereafter be issued," significant, because the mortgage of January 1, 1879, to which those words refer, expressly provided that the bonds to be issued under it were to be used to reduce and secure the bonds issued under the mortgage of October 15, 1872. It is hardly possible that, at the time when the mortgage of April 1, 1880, was executed, it was contemplated that any bonds would be thereafter issued under the mortgage of January 1, 1879, for the loan of money, or to be sold on the market; but it is very probable, as the holders of the bonds under the mortgage of October 15, 1872, were entitled to have their bonds exchanged for bonds to be issued under the said mortgage of January 1, 1879, that it was contemplated by the parties to the mortgage of April 1, 1880, that bonds might be thereafter issued under the mortgage of January 1, 1879, in exchange for bonds issued under the mortgage of October 15, 1872, and it was these

bonds, so thereafter issued in exchange, that the trustees in the deed of April 1, 1880, were to take up. This fact and purpose, appearing upon the face of the mortgage to the Fidelity Co. was of course notice to it. It therefore seems clear that the Fidelity Co. is chargeable with notice, by the records under which it claims title, that the holders of bonds issued under the said mortgage of October 15, 1872, have a prior lien on the railroad property in said mortgage mentioned, unless said lien has been either legally released or equitably barred, as against the rights of the Fidelity Co. I think it may be assumed as a legal proposition, which will not be controverted or denied, that unless the deed of August 25, 1879, executed by W. H. Travers, as substituted trustee, releasing the mortgage of October 15, 1872, operated to exempt the Fidelity Co. from notice, or any liability for the bonds issued under said mortgage, then the said company is not entitled to the position of a purchaser without notice, as against the claim of the Central Improvement Co.. The said mortgage of October 15, 1872, provided that, in the event of the death of the trustee therein named, the grantor should have the authority to appoint his successor. It seems to me, therefore, that the substitution of W. H. Travers as trustee therein for J. Edgar Thompson, deceased, was a legal exercise of that authority, and conferred upon said Travers all the powers possessed by said Thompson as trustee therein.

The only provision in the said mortgage of October 15, 1872, which can be construed into an authority to the trustee to release the same, under any conditions or circumstances, is that contained in the proviso declaring "that if the party of the first part . . . shall and do well and truly pay or cause to be paid unto the person or persons, bodies politic or corporate, who shall become the holders of the bonds intended to be secured hereby, the several respective sums expressed therein, . . . according to the provisions of said bonds, . . . then and from thenceforth as well this present indenture . . . as the said recited obligations shall become void and of no effect, . . . and satisfaction shall be forthwith duly entered by the said trustee or trustees, for the time being, upon the record of this indenture of mortgage." This proviso is a positive contract between the grantor, the trustee, and the bondholders, and contains the only authority upon which the trustee can release the mortgage. The manner of exercising this authority is limited by the contract to the simple entry of satisfaction by the trustee upon the record of the mortgage. But even if this power could be properly exercised by the execution of a deed of release, as was done in this instance, it could only be done upon the con-

Authority of
trustee to re-
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gage.

dition precedent prescribed in the contract or mortgage itself, that is, upon the payment of the bonds to the holders thereof; and any release or attempt to release the mortgage by the trustee, whatever may be its form, if executed before the happening of or compliance with this condition, is absolutely null and void; and a subsequent purchaser must at his peril ascertain whether or not this condition has been performed. 2 Minor, Inst. 209, 257; 2 Perry, Trusts, § 783; Jackson v. Ligon, 3 Leigh (Va.), 161; Raper v. Sanders, 21 Grat. (Va.) 60. The trustee can only do with the trust property what the deed, either in express terms or by necessary implication, authorizes him to do. Seborn v. Beckwith, 30 W. Va. 774; Mundy v. Vawter, 3 Grat. (Va.) 518; Heth v. Richmond; F. & C. R. Co., 4 Grat. (Va.) 482. "When a recorded mortgage is discharged by a person other than the mortgagee, the person paying the money, and all subsequent purchasers as well, are bound to inquire what authority he had to discharge it, and are chargeable with notice of such facts as by proper inquiry might have been ascertained. . . . A mortgagee, with notice that a prior mortgage has been improperly discharged without being satisfied, still hold, subject to that mortgage as much as if no discharge had been made. If, for instance, he has notice that the prior mortgage has been assigned as collateral security, and the assignment, not being recorded, the assignor enters satisfaction of it on record, this does not deprive the assignee of his priority of claim. The discharge, however, would bar all equitable rights of the assignor, and the assignee could recover only to the extent of his actual interest in the mortgage." 2 Jones, Mortg. § 957; Swarthout v. Curtis, 5 N. Y. 301.

The said deed of release of August 25, 1879, after reciting the provisions of the mortgage of October 15, 1872, and the fact that the Shenandoah Valley R. Co. had executed the mortgage of January 1, 1879, to the Farmers' Loan & Trust Co. to secure \$2,250,000 of bonds, contains the following provision: "And whereas, there have been surrendered to the said party hereto of the first part, the trustee substituted as aforesaid, all of the bonds, as well those issued as those executed, but not issued under and in pursuance of the terms of the said mortgage, bearing date October 15, 1872, for cancellation; and whereas, the said trustee hath cancelled and destroyed all of the said bonds, numbering three thousand seven hundred and fifty, each for one thousand dollars, amounting in all to the sum of \$3,750,000, being the whole number and amount of bonds secured by the said mortgage deed dated October 15, 1872, and hath cancelled also and destroyed all coupon attached to and detached from the said bonds, and that in any wise and at any time belonging to the said bonds: Now, in consideration of the prem-

Deed of release.

ises, and of the payment of the sum of five dollars by the party of the second part to the party of the first part, the said William H. Travers, by virtue of the authority vested in him as substituted trustee, as aforesaid, by the said mortgage deed, bearing date the fifteenth day of October, 1872, and in discharge of the trust therein reposed in the trustee named therein, and his successor and successors, doth grant, remise, release, surrender, assign, and set over unto the Shenandoah Valley R. Co. all the right, title, interest, property, and estate granted and conveyed by the mortgage deed bearing date as last mentioned, and recorded as aforesaid, and to which reference is hereby expressly made for a description of the same, to the intent that all the right, title, interest, property, and estate of the said Shenandoah Valley R. Co., granted as aforesaid, may be discharged from the said mortgage." It will be observed that the words "surrendered," "cancelled," and "destroyed" are used in this provision of the deed, but it is nowhere stated therein that the bonds secured in the mortgage of October 15, 1872, had been either paid or satisfied. It will also be noted that it is not stated by whom the bonds "had been surrendered,"—whether by the owners or holders or some unauthorized person. It becomes therefore important to inquire into the facts and circumstances under which said bonds were "surrendered," because the cancellation of a mortgage on the record is only *prima facie* evidence of its discharge, and the owner may prove that the cancellation was done by fraud, accident, or mistake, and, if he does this, his rights under the mortgage will not be affected by the improper cancellation of it. *Heyder v. Excelsior B. L. Assoc.*, 42 N. J. Eq. 403; *Kennicott v. Board of Supervisors*, 16 Wall. (U. S.) 469; *Harris v. Cook*, 28 N. J. Eq. 345. "A release executed by a trustee in a deed of trust, without the authority of the *cestui que trust*, and without having received payment of the debt secured, does not discharge the lien." 2 Jones, *Mortg.* § 957; *Lakenan v. Robards*, 9 Mo. App. 179.

The circumstances under which the \$531,000 of bonds of the Central Improvement Co. were "surrendered" and destroyed appears by the record to be as follows: The office of the improvement company in the city of Philadelphia was kept in the office of the Pennsylvania R. Co. The said \$531,000 of bonds had been put in the safe of the improvement company in said office by J. P. Green, the then treasurer of the company. Green resigned, and turned the bonds over to his successor, J. H. Mackeehan, who died, and was in the year 1877 succeeded as treasurer by his brother, C. W. Mackeehan, who held said office until after 1880. The bonds remained in safe, and it seems that C. W. Mackeehan was never informed that they were there. After the aforesaid agreement

Surrender of
bonds.

of April 29, 1878, had been executed, and a duplicate copy thereof delivered to the railroad company, and only a few days after W. H. Travers had been made substituted trustee in the said mortgage of October 15, 1872 (the appointment of said Travers having been made on December 6, 1878), the said Travers, accompanied by U. L. Boyce, the vice-president of the railroad company, went to the office in which said bonds were kept, where they found J. P. Green, a vice-president of the Pennsylvania R. Co., but who had no authority or control over the said bonds, took possession of the said \$531,000 of bonds, and destroyed them, together with all the other bonds issued under the said mortgage of October 15, 1872. J. P. Green, in answer to the question, "Under what circumstances were these bonds destroyed?" deposes: "My understanding was, at the time, it was in pursuance of an arrangement between the Central Improvement Co. and the Shenandoah Valley R. Co., by which all of the old first mortgage bonds were to be destroyed, and new bonds take their place." And the said Travers, in reply to the same question, deposes: "I had known that negotiations were going on between the Shenandoah Valley R. Co. and the Central Improvement Co., to whom a portion of these bonds have been delivered, to relieve the road from the encumbrance of the mortgage of 15th of October, 1872, and I was advised of the fact that those bonds had been surrendered, or were under the control of the Central Improvement Co., and were ready for cancellation and destruction. Under that arrangement, and being so advised, I went to the office of the Central Improvement Co. and the Pennsylvania R. Co., and found them there in the possession of Mr. Green. I examined them, and found that they were all there, as described and called for in the deed of trust of October 15, 1872, together with all the coupons attached,—and some of them probably had been detached,—and they were destroyed in my presence and with my assistance." Mr. Travers also testified that he was at the time a stockholder, director, and general counsel for the railroad company.

It is impossible to assert or believe, in the presence of these facts, and others appearing in the record, that Mr. Travers did not take possession of and destroy said bonds of the improvement company under and upon the authority contained in the aforesaid agreement of April 29, 1878, and upon that authority alone. Any other conclusion would place Mr. Travers in the position of having destroyed them without any right whatever to do so; for there is not a particle of evidence that he had any other authority. Having destroyed said bonds under the authority conferred by said agreement, Mr. Travers, of course, knew its contents. By the terms of said agreement,—which the Fidelity Co. admits, and insists is a valid and binding con-

tract,—the improvement company agreed to surrender and deliver to the railroad company the said \$531,000 of bonds, in consideration of the issuing and delivery to it by the railroad company of certain second mortgage and income bonds therein specified. The surrender of the bonds held by the improvement company, and the delivery of the bonds to be given in exchange therefor by the railroad company, were to be dependent or concurrent acts. If they were not both performed at the same time, the performance of its part by either company imposed an immediate obligation on the other to perform its part. It therefore appears that the railroad company, by U. L. Boyce, its vice-president, and W. H. Travers, the substituted trustee in the mortgage of October 15, 1872, assumed the responsibility of performing, and did perform, for the improvement company, its part of said agreement without its knowledge or assistance. Whatever might be said by the improvement company as to the propriety and good faith of this transaction, it is certain that neither the railroad company nor W. H. Travers, the trustee, can question or deny that it was, in effect, a full and complete performance on the part of the improvement company of its part of said agreement, and that it thereby became, *eo instanti*, entitled to the substituted bonds provided for therein. Of this fact both the railroad company and W. H. Travers were of necessity fully informed.

It is thus apparent that the word "surrendered" was advisedly used in reference to these bonds by Mr. Travers in the deed of release of August 25, 1879. We have now shown that the "surrender" of said bonds was upon the authority of an agreement, and under circumstances which made it the duty of the trustee to see that the bonds due to the improvement company, by virtue of said agreement, were delivered to it, or at least to give notice to subsequent purchasers of the fact that said company was entitled to said bonds. It must therefore be presumed that, if he did not perform this duty by giving such notice to the Fidelity Co. and the other subsequent purchasers, he certainly would have informed them of all the facts if inquiry had been made of him. *Caylus v. New York, etc., R. Co.*, 10 Hun (N. Y.), 295; *Acer v. Westcott*, 1 Lans. (N. Y.) 193; 1 Story, Eq. Jur. § 399. Was there anything upon the records, or in the circumstances of the transaction, which made it the duty of the Fidelity Co., as a subsequent purchaser, to make this inquiry? As we have seen, the only condition upon which the trustee was authorized to release the mortgage of October 15, 1872, was upon the true payment of all the bonds therein secured to the holders thereof. Now, in the search which the Fidelity Co. was legally bound to make when it read the mortgage and then found in the deed purporting to release that

Duty of Fidelity Co. to make inquiry as to surrender.

mortgage the word "surrender" instead of "payment" or "satisfaction," would it not have been an act required by the most ordinary prudence and diligence for it to have gone to Mr. Travers, the trustee, who had used that word in executing the release, and have made of him the inquiries by whom and under what circumstances were said bonds "surrendered"? In addition, the Fidelity Co. knew from the records through which it claims title that the prior mortgages of January 1, 1879, and of September, 1879, had been executed to take up the bonds issued and outstanding under the mortgage of October 15, 1872, and that its mortgage of April 1, 1880, was, in turn, executed to take up the bonds then or thereafter issued under said mortgage of January 1, 1879. *Wade*, Notice, §§ 308, 309; *Taylor v. King*, 6 Munf. (Va.) 358; *Briscoe v. Ashby*, 24 Grat. (Va.) 454; *Coles v. Withers*, 33 Grat. (Va.) 201. And, of necessity, it must also have known that the Shenandoah Valley Railroad was at the time, if not insolvent, not plethoric with money to pay off its bonds before maturity, and that it was not likely that the holders would gratuitously surrender their first mortgage bonds to the company or its trustee; and especially so in the face of the fact that the company was then using its utmost efforts to borrow money, and shingling over its property with new mortgages for that purpose. It seems to me that if these facts and circumstances were not sufficient to excite diligence and invoke inquiry from the most careless, then nothing in reason could be expected to do so. "A party wilfully closing his eyes against the lights to which his attention has been directed, and which, if followed, would lead to a knowledge of all the facts, is chargeable with notice of every fact that he could have obtained by the exercise of reasonable diligence. . . . The limit of inquiry necessary in any case is that required by the use of reasonable diligence. What is reasonable diligence cannot be determined by any general rule, but must vary with the circumstances of each case." 1 *Jones*, Mortg. § 596. The circumstances in this cause, it seems to me, are entirely sufficient to have put the Fidelity Co. on inquiry as to the terms and conditions by whom the bonds of the improvement company were surrendered; and if this inquiry had been made of the trustee, W. H. Travers, it would have been informed that they had been taken possession of by him, and destroyed, under the said agreement of April 29, 1878, and this agreement would have given it notice of the equitable lien of said company. *Burwell v. Fauber*, 21 Grat. (Va.) 463; *Long v. Weller*, 29 Grat. (Va.) 353; *Watts v. Kinney*, 3 Leigh (Va.), 293, 296; *Association v. Thompson*, 31 N. J. Eq. 536; *Swarthout v. Curtis*, 5 N. Y. 301, 309; *Claflin v. South Carolina R. Co.*, 8 Fed. Rep. 118, 4 Am. & Eng. R. Cas. 231; *Brush v. Ware*, 15 Pet. (U. S.) 93; *Roberts v. Halstead*, 9 Pa. St. 32. I am

therefore of opinion that the Fidelity Co. is not a purchaser without notice as to the said equitable lien of the improvement company.

Having reached this conclusion, it is apparent there is no foundation for the contention of the improvement company that the railroad company has disabled itself by subsequent mortgages from performing its part of the said agreement of April 29, 1878. All these mortgages are subordinate to the claim of the improvement company under said agreement; and said claim may be enforced, not only against the railroad company, but against those claiming under said mortgages as well. I think it better to abstain at this time from indicating the manner in which this equitable lien of the improvement company ought to be enforced, or the specific form of the relief to be granted in that behalf under the peculiar circumstances of this cause, for the reason that none of these matters were considered or passed upon by the circuit court, nor were they discussed by counsel in the argument before this court. From what has already been said, and from the facts appearing in the record, it is not apprehended there can be any serious difficulty in settling these questions. It seems to me the objections made by the Fidelity Co. to the right of the improvement company to intervene in this cause are not well taken. While it is true the decision in *Muller v. Dows*, 94 U. S. 444, and other cases hold that the railroad property in this state could have been sold in the Roanoke city suit, still, as the railroad company is a domestic corporation of this state as well as Virginia, and the plaintiff, the Fidelity Co., has elected to invoke the jurisdiction of a court in this state in aid of its suit in Roanoke city, I do not think it can exclude the creditors of the railroad company from intervening in either court. In the view we have taken of the rights of the improvement company in this cause, the question of laches does not apply. It appears from the amended bill in the Crumlish suit that the plaintiff never discovered until after December, 1882, that there was any adverse claim or denial of the right of the improvement company to the bonds which it was entitled to under the agreement of April 29, 1878. It also appears in the record that all the bonds issuable under the mortgage of April 1, 1880, had been negotiated in 1881, before said discovery was made; and consequently, even if the holders under that mortgage were not purchasers with notice, any delay, after they had invested their money in 1881, could not be to their prejudice. It therefore seems to me, for this reason, and others so apparent in the record as to require no discussion, that the defence of laches must be overruled.

For the reasons stated I am of opinion that both the decrees appealed from in these causes must be reversed,—that of Novem-

ber 29, 1887, at the costs of J. Garland Hurst, administrator, etc., the plaintiff therein; and that of September 11, 1888, at the costs of the Fidelity Insurance, Trust & Safe-deposit Co., the plaintiff therein,—and that these causes be remanded to the circuit court for further proceedings, there to be had therein, according to equity and the principles announced in this opinion.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

HOLLISTER

v.

STEWART *et al.*

(*New York Court of Appeals, January 15, 1889.*)

Mortgage—Power of Trustees to Waive Default in Payment of Interest and Further Assurances of Title.—By the provisions of a mortgage the trustees were required to exercise their power of entry or power of sale, or both, if the default was in the payment of interest or principal of the bonds, upon the requisition of the holders of one fourth of the aggregate amount of the bonds; but if the default was in anything required to be done for the further assuring of the title of the trustees to any property or franchises belonging to the company, "the requisition shall be as aforesaid, but it shall be within the discretion of the trustees to enforce or waive the rights of the bondholders by reason of such default, subject to the power hereby declared of a majority in interest of the holders of said bonds, by requisition in writing, or by a vote at a meeting duly held, to instruct said trustees to waive such default, or to enforce their rights by reason thereof." *Held*, that this provision did not give the trustees a discretion to waive a default in the payment of interest or principal of the bonds, subject only to be controlled by the requisition or vote of a majority in the interest of the bondholders.

Jurisdiction—Defence that Another Action Pending must be Plead.—The defence that the court has no jurisdiction of an action against the trustees in a railroad mortgage for breach of trust and misapplication of the funds in their hands by reason of the pendency of another suit is not available unless it is pleaded.

Same—Pendency of Action in Court of United States or Sister-state.—The pendency of another action *in personam* for the same cause in a court of the United States or of a sister-state is no defence to an action in a New York court against the trustees under a railroad mortgage.

Mortgage—Non-assenting Bondholders not Affected by Scheme of Reorganization.—A scheme of reorganization which contemplates the substitution of three mortgages for a first mortgage and some other obligations of the company, one of the mortgages being made a first lien on all the property of the company, is not binding upon a first mortgage bondholder who has never assented thereto, and the trustees under the first

mortgage cannot divert to the new securities funds pledged by the first mortgage.

Same—Application of Funds—Distribution on Foreclosure.—The trustees in a railroad mortgage cannot, as against a non-assenting bondholder, justify the application of funds in their hands to the securities created under a scheme of reorganization upon the ground that the scheme of reorganization was tantamount to and took the place of a distribution after foreclosure and, that as a court of equity would, on such distribution, prefer certain debts and obligations over the mortgage bonds, the trustees were justified in giving a similar preference.

Same—Priority—Interest on Overdue Coupons—Principal Debt.—Interest upon unpaid coupons of mortgage bonds is not entitled to payment in priority to the principal of the mortgage itself.

Same—Priority—Coupons Purchased by Contractors—Mortgage Bonds.—A railroad company made a contract for the construction of its road by which bonds to the amount of \$25,000 a mile were to be issued to the contractors, who were to procure the necessary money by the sale of the securities, and were to advance funds and buy up the coupons as they matured. *Held*, that the contractors were not entitled to priority over the bondholders for coupons purchased in terms of the contract.

Same—Misapplication of Funds—Personal Judgment against Trustees.—Where a bondholder who refused to concur in a scheme of reorganization claimed, in an action against the trustees for misapplication of funds in his hands, that the funds should be applied as if the whole of the assenting mortgage bonds had been extinguished, and that the whole funds should be applied to the few non-assenting bonds alone, a finding that the trustees, though acting erroneously, proceeded in good faith, is sufficiently supported, and judgment is properly rendered against the trustees only as such, and not personally.

RUGER, C. J., EARL and ANDREWS, JJ., dissenting.

APPEAL from General Term of the Supreme Court, First Department.

Action by William H. Hollister against John A. Stewart, Edwin H. Abbott, trustees, and the Wisconsin Central R. Co., to compel the defendants Stewart and Abbott to apply certain funds to the payment of the amounts due plaintiff upon certain first mortgage bonds executed by the defendant company. Both parties appeal from the judgment of the general term, which is reported in 37 Hun (N. Y.), 645. The court of appeals having, on the first appeal, been evenly divided, a rehearing was granted.

Wheeler H. Peckham for plaintiff.

D. S. Wegg for defendants.

FINCH, J.—The trustees to whom the first mortgage of the Wisconsin Central R. Co. was given, and who by that instrument were charged with certain duties, and intrusted with important powers for the benefit and protection of the bondholders secured by its lien, have been adjudged unfaithful to their trust, and required to furnish indemnity for the past, and properly perform their duty in the future. Both sides appeal—the trustees upon the ground that they have in no just sense or respect

violated their duty, but have acted in all things within their powers, and wisely, for the interest of those whom they were bound to protect; and the plaintiff, who holds bonds secured by the mortgage to the amount of \$200,000, because the general term modified the judgment by relieving the trustees from personal liability, and from the command to prosecute the foreclosure of the mortgage, already commenced, to an ultimate sale and distribution.

To obtain a safe foundation for our judgment, it thus becomes necessary to examine fully the provisions of the mortgage, since the authority of the trustees has no other source, and their duty no other measure. That mortgage, given for something over \$8,000,000, was executed by the company substantially for the purpose of obtaining the means with which to construct its road. The security covered not only the line, with its rolling-stock and stations, and other usual property, but also a valuable land grant, given by the general government to aid in the completion of the enterprise, and conditioned upon its progress towards that completion. All this property, by article 2 of the mortgage, is pledged to the payment of the interest and principal of the bonds, and it is made the duty of the trustees to apply the same "promptly to purpose" "in case of default in any such payment" by the mortgagor. But this encumbrance, covering the land grant earned by the corporation, and intended to be utilized by sales as purchasers could be obtained, involved the necessity of an authority in the trustees to release the lands from the lien when the sales were effected. Accordingly article 3 authorized the corporation, with the approval of the trustees, to contract for the sale of such lands for cash or on credit, and accept any of the bonds with their matured coupons at par in payment; but required that all the proceeds of every such sale, "whether in cash, bonds, coupons, or other securities," should be deposited with the trustees, and proper releases be given by them to the purchasers. The proceeds of the lands thus became substituted for the lands themselves, and continued subject to the mortgage lien. Out of these proceeds a sinking-fund was established for the payment and redemption of the bonds. The trustees were directed to invest such proceeds in the first mortgage bonds of the company whenever they could be purchased at not exceeding par and accrued interest, but the trustees were not to hold the bonds and coupons which thus came into their hands as living obligations against the company, for, whether obtained by purchase with the proceeds of sales or taken as cash in payment for the lands, the trustees were required to cancel them every three months, and surrender them to the company as paid. In other words, the authority was to pay the bonds out of pro-

Provision of mortgage.

ceeds, but not to buy and hold them against the obligors, or mortgage such proceeds for other purposes. As to any proceeds which could not be so appropriated because bonds could not be obtained at par, further provisions were made for their investment, specifying the classes of securities, and reserving some choice and discretion in that respect to the company. By article 4 additional strength and protection was given to the sinking-fund through a provision relieving it from the payment of interest on the bonds during the progress of construction except in one emergency. That interest was to be paid by the company, and none of the land proceeds were at any time to "be appropriated to the payment of interest on said bonds" unless the treasury of the company should be first exhausted. In that event the sinking-fund was permitted to pay accrued interest; not, as we have said, to buy or secure coupons, but to pay and discharge them; and since in so doing the land fund would be bearing the burden contracted to be borne by the company, such reimbursement as seemed reasonably possible was ordered to be made. For all such payments of interest made out of the sinking-fund in the prescribed emergency the company was to give to the trustees income bonds to be first paid out of earnings before any dividend to stockholders. These bonds were to draw interest at 7 per cent, and were to "be redeemed by other bonds of the company bearing the same rate of interest in gold, and secured by a second mortgage" if the company should determine to issue such bonds.

The mortgage then regulated the duties of the trustees in case of default. If such default in the payment of interest continued for six months, the whole principal became due at the option of the trustees, and they were authorized to enter upon and sell the granted lands at public auction; to enter upon and take possession of the railroad and its rolling stock; to operate and manage the line, and apply any surplus over expenses and necessary repairs and improvements to the payment of interest upon the first mortgage bonds "in the order in which such interest shall have become or shall become due, ratably to the persons entitled to such interest;" but if the default should continue for a year, then the trustees were authorized to sell the whole of the property, or so much as might be necessary, and apply the net proceeds "to the payment of the principal of such of the aforesaid bonds as may be at that time unpaid, whether or not the same shall have previously become due, and of the interest which shall at that time have accrued on the said principal and be unpaid without discrimination or preference, but ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest." Article 13 required the company to execute such further deeds and assurances as might be needed, and to

furnish a full inventory of all the movable property of the company. Article 16, about which there is serious dispute over its scope and meaning, deals again with the emergency of a default, and makes it the duty of the trustees to exercise their power of entry or power of sale, or both, or take appropriate legal proceedings to enforce the mortgage in the manner following: If the default is in the payment of interest or principal of the bonds, then upon the requisition of the "holders of not less than twenty-five per cent of the aggregate amount of said bonds," accompanied by a proper indemnification by the persons making the same against the costs and expenses to be incurred. But the instrument proceeds: "If the default be in the omission of any act or thing required by article twelfth of these presents for the further assuring of the title of the trustees to any property or franchises now possessed or hereafter acquired, or in any provisions herein contained to be performed or kept by said company, then and in either of such cases the requisition shall be as aforesaid; but it shall be within the discretion of the trustees to enforce or waive the rights of the bondholders by reason of such default, subject to the power hereby declared of a majority in interest of the holders of said bonds, by requisition in writing, or by a vote at a meeting duly held, to instruct the said trustees to waive such default, or to enforce their rights by reason thereof, provided that no action of the said trustees or bondholders, or both, in waiving such default or otherwise, shall extend to or be taken to effect any subsequent default, or to impair the rights resulting therefrom." It is substantially conceded, as, indeed, is quite apparent, that the word "effect" should be read "affect," and that the reference to article 12 should be to article 13, which contains the provisions for further assurance which are referred to and which identify the article intended.

It is now said on behalf of the trustees that this provision gave them a discretion to waive a default in the payment of interest or principal of the bonds, subject only to be controlled by the requisition or vote of a majority in interest of the bondholders. We do not accede to that construction. Provision had just been made in a preceding paragraph for the emergency of a default in principal or interest, which imposed the duty of proceeding upon the default on the requisition of 25 per cent in interest of the bondholders.* That gives no discretion to the trustees, but imposes an imperative duty. The following subdivision, entirely different in its terms, relates to another and distinct default, less serious in its consequences, and not of such vital importance, as to which a discretion was given which might be controlled by a majority in interest. By its very language it relates to a default in the covenants for further assurance in article 13; and

Power of trustees to waive default in interest or principal.

its added words, "or in any provisions herein contained to be performed or kept by said company," although very general and broad, must be construed to relate to the provisions other than those already provided for by different and more stringent directions. It is easy to see that discretion to waive a default, sustained by a majority in interest of the bondholders, might prudently and safely be given to the trustees as to covenants for assurance, and to furnish an inventory and the like, while it is scarcely possible to suppose that the enormous discretion of waiving every default of interest or principal was intended to be conferred. Stockholders of the company buying a trifling excess over half of the bonds could, with the aid of the trustees, practically annul and cancel the whole debt, and take to themselves the entire net earnings of the company. We are confident that the language of the subdivision, taken exactly as it stands in the record, does not refer to a default in principal or interest, but relates wholly to the other covenants to be kept and performed by the mortgagor. The mortgage contained a further provision, important to be considered in reaching a determination of the appeal, that neither of the trustees "shall be answerable except for his own wilful default or misconduct."

Having thus ascertained the authority and duty of the trustees, it becomes necessary to get as clear and definite a view of what they did as can be gathered from the record; and this can only be done by taking also into view the precedent and concurrent action of the railroad corporation itself. The mortgage was executed on the 1st day of July, 1871. The company seems at once to have abdicated all its functions beyond merely retaining its corporate existence, for it agreed with contractors who engaged to build the road to give them the whole issue of bonds, not exceeding \$25,000 a mile, which was the maximum limit of issue, and the whole of the stock, and all the earnings of the road during the period of construction, as a consideration for such construction. The contractors were to procure the necessary money by sale of these securities, and were to advance funds and buy up the coupons as they matured, and possibly retain them as against the company. They proceeded with their work. They sold the bonds, and bought the maturing coupons, and continued this process until their debt, represented by such coupons, amounted to something more than half a million of dollars. Parallel with this accumulating debt, the land fund in the hands of the trustees was being filled by the sales of lands, the proceeds of which, in the form of cash, contracts, mortgages, and the like, reached what is called a large sum, but which the record does not disclose. In this condition of affairs, and while the road was incomplete, and in December, 1874, it became apparent that the

Payment of
coupons from
land fund.

contractors were about to fail of performance, and could not continue to furnish funds for the purchase of coupons. Interest amounting to something over \$150,000 was about to mature, and the company's treasury was exhausted. Indeed, there had never been either treasury or treasurer. To meet this emergency the land fund was the sole resource, and was called upon, as by the terms of the mortgage was permitted. What then occurred is involved in so much of confusion and uncertainty, from want of details, that, to avoid mistakes, we take the facts from defendants' brief. It declares that "the contractors, prior to January 1, 1875, had bought up and held as unpaid as against the company \$534,869.25 of coupons. To induce and enable the contractors to buy up the coupons maturing January 1, 1875, the land proceeds to the amount of \$534,869.25 were assigned and paid to the contractors." If that be true, the overdue coupons were paid and extinguished, and the transfer cancelled the debt. So far there is no hint that the assignment was collateral, and the trustees

Thereafter the trustees, under the authority of the mortgage solely, and without judicial intervention, took possession of the railroad, and began to operate it, and eventually joined with the bondholders outside of the plaintiff and a few others in a plan of reorganization. That contemplated the substitution of three mortgages for the first mortgage, and some other obligations of the company. One of these mortgages for \$400,000 was made a first lien on all the property of the company. The other two were framed for a reduced rate of interest. To this plan the plaintiff never assented, but the trustees adopted it, assumed to waive all existing defaults under the first mortgage, and agreed to waive them in the future; applied some part of the proceeds of the land fund to payments of interest and principal of the new preferred mortgage; and notified the plaintiff that they should pay such proceeds indiscriminately upon the new bonds as well as the old. Before this action was commenced they had paid on the preferred mortgage almost \$80,000, ignoring the plaintiff, and paying him nothing; and when, after the commencement of the action, they began payments to him, these were made, not in accordance with his rights, but as if he assented to the reorganization scheme, which he steadily repudiated.

Scheme of
reorganiza-
tion.

It is conceded that the trustees have on hand, as proceeds of land sales applicable to the purposes of the sinking fund, \$100,000, with which they propose to buy preferred or first or second series bonds issued under the reorganization scheme. The special term prohibited that action, and declared the new bonds utterly void as against the plaintiff. The general term concurred in that result, and, on defendants' appeal, we are to determine whether that decision is right.

It is first met on the part of the defendants by a protest against any exercise of the jurisdiction of the court founded upon the alleged fact of the pendency of the foreclosure suit with its supplemental bill in the federal court in Wisconsin. No such defence was pleaded. The plaintiff came to trial without warning or preparation to meet any such issue. We have held at the present term of the court that a defence in equity that the court ought to refrain from the exercise of its conceded jurisdiction is never available unless pleaded, and, where the answer is silent, that amounts to a submission of the issues to the judgment of the court, and a consent that upon those issues its judgment may be exercised. *Town of Mentz v. Cook*, 22 Am. & Eng. Corp. Cas. 50. The defence asserted is, in substance, that another action is pending for the same cause. That is new matter required to be pleaded in the answer. The defence was not only not pleaded, but was not raised upon the trial at special term. There is no finding by the referee of any such fact, and no request even that he make such finding, and no trace of the submission of that question to his judgment. There is a finding of the pendency of a foreclosure suit, but remaining unprosecuted. No argument is needed to show that such suit is not for the cause of action here alleged. Indeed, one of the issues now presented is whether the trustees should be required to proceed with the foreclosure suit, or may abandon it, as they seek to do. There was a request to find, which was refused, that a supplemental bill had been filed, setting up the proposed plan of reorganization, and asking judgment upon it, but no request to find that such supplemental bill involved the cause of action here asserted, and no request to find as a conclusion of law that the jurisdiction of the court should not for such reason be exercised. In *Dewey v. Moyer*, 72 N. Y. 70, 77, we decided that it was not enough even that the facts were made to appear, but the defence for which they were to be used and intended to be relied upon must be stated, so that the adversary may know the real issue sought to be raised. The rule requiring the identity of the two causes of action to appear is strictly enforced (*Dawley v. Brown*, 79 N. Y. 398); and it is not enough that the property in controversy in both actions is the same (*Stowell v. Chamberlain*, 60 N. Y. 272). But beyond the pleadings there was no proof to warrant even the request which was made. No supplemental bill or copy thereof was produced. We do not know its contents; we cannot tell what issues it raises; we do not even know that it has been followed by any process or proceeding bringing the railroad company into court to answer it. All we know is the hearsay statement of Mr. Abbott, who was not even trustee when the bill was filed, that there is such a bill,

Pendency of
another suit
must be
pleaded.

that it sets out the scheme of reorganization, and asks some judgment of some character upon it. For all that appears to the contrary, it may not touch the rights of non-assenting bondholders in the least degree, or contain a single allegation which brings those rights before the court. The defence not only was neither pleaded, nor proved, nor found by the referee, but it is no defence to this action at all. Both at law and in equity the pendency of another action for the same cause in a court of the United States or of a sister state is no defence to an action in our courts. *Oneida Co. Bank v. Bonney*, 101 N. Y. 173; *Mitchell v. Bunce*, 2 Paige (N. Y.), 606, 620. The cases relied upon by the learned counsel of the defendants were those in which the proceeding was *in rem*, and the court first seizing the *res* was adjudged entitled to hold it against any other proceeding *in rem*. Thus, in *Taylor v. Carryl*, 20 How. 583, the sheriff, under process of attachment in the state court, had seized the ship, and thereafter the sailors undertook to proceed in admiralty by process also *in rem*, and the marshal sought to seize the vessel. It was held that he could not do so, and that, where jurisdiction depended upon the possession of the *res*, the court first seizing it had exclusive jurisdiction. The present is not an action *in rem*, nor does the action in Wisconsin appear to be of that character. Neither court, by the appointment of a receiver, has taken possession of the *res*, or needs to do so for the purposes of its jurisdiction. The case at bar is purely an action *in personam*, and the doctrine invoked has no application. In *Smith v. McIver*, 9 Wheat. 532, the cases had all gone to judgment in the courts of law, and the equity court respected those judgments, and refused to try the cases over at its own bar. The other cases cited were proceedings *in rem*, where the priority of seizure determined the jurisdiction. But an answer still more fatal to the claim of the appellant is that the present plaintiff is not a party to the Wisconsin action, and has full right to pursue his remedy in his chosen tribunal. The answer made to this suggestion is little less than repulsive to one's sense of justice. It is that in the Wisconsin action the trustees, who are plaintiffs, represent and can bind the plaintiff here; that is to say, in a quarrel between the bondholder and his trustee, in which they are adverse parties, and the latter is asked to account to his *cestui que trust* for funds misapplied, the trustee may sue the company, asking to have his violation of the terms of the trust mortgage condoned, and represents the complaining bondholder for the purpose of obtaining such an adjudication. No case holds any such doctrine, and, if it ever does, will need careful scrutiny. The case appealed to is very far from holding what is claimed. *Shaw v. Little Rock & F. S. R. Co.*, 100 U. S. 612. There a

Suit in court
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defence.

foreclosure had taken place, and a purchase had been made on the sale, and the question was over its confirmation. That question affected all the bondholders alike. The court said that the trustee represented the bondholders "within the scope of his powers," and in matters "consistent with his trust," and held that "to avoid what the trustee has done" the bondholder "must proceed in some other way than by bill of review." That is true. He must sue the trustee, as this plaintiff has done, and bring both sides before the court as the adverse parties they in fact are.

It was said to us on the argument that the court in Wisconsin might disregard our judgment. We shall not assume that such court will do anything except what it believes to be its duty, and have no occasion to anticipate emergencies which would not change our own responsibility, even if they existed. We deem it, thus, entirely clear that we ought not to deny to the plaintiff the relief he asks for the reason suggested.

The principal relief granted to him, and which the trustees, on their appeal, ask us to reverse, is a decree compelling them to pay the proceeds of the land sales in their hands, and such as they have misapplied, in due and ratable proportion upon the plaintiff's bonds, and adjudging to be void as against him the new preferred mortgage and the two added securities. That is simply holding the parties to the conditions of the mortgage, and compelling the trustees to act in accordance with the terms of their trust. The scheme of reorganization could only be made effective in one of two ways,—by the consent of all the bondholders, or by a foreclosure cutting off their lien, and so enabling a new corporation to make its own mortgages in its own way. The plaintiff had a clear right to stand upon his contract, and the trustees had no power or authority to compel him to make a new and different one. We are not concerned with his motives, but only with his rights. Without his consent the company and the trustees, the other parties to the contract, could not vary its terms, and divert to new securities the funds pledged by the mortgage to its payment. The proposition is almost too plain for argument. Unless railroad syndicates or committees are to be put above the constitution, the trustees cannot set aside and change their contract with plaintiff of their own volition without his consent. The authorities for any such right are necessarily either unsound or inapplicable; and an illustration of their lack of pertinency is found in *Canada S. R. Co. v. Gebhard*, 109 U. S. 527, 14 Am. & Eng. R. Cas. 581. In that case the scheme of reorganization, which modified and changed the contract rights of the bondholders, was authorized and legalized by a special enactment of the dominion parliament;

Trustees could not alter plaintiff's rights without his consent.

and the federal court said of it that, since no constitutional obligation prevented in that jurisdiction a destruction of the contract and the substitution of a new one, such legislation must prevail, and govern the rights of the parties. But the court said also: "In the absence of statutory authority, or some provision in the instrument which establishes the trust, nothing can be done by a majority, however large, which will bind a minority without their consent." Here the trustees are not a legislature, and, if they were, would be checked by the constitution, which permits no arbitrary tampering with contracts, and protects the rights thereby secured. The cases cited to show that this plaintiff was not entitled to any greater rights because of the reorganization scheme, show also that he was fully entitled to his original contract rights. In *Stevens v. Mid-Hants R. Co.*, L. R. 8 Ch. 1064, the substance of the court's doctrine was embraced in the pithy sentence: "We ought to take care that his interests are not prejudiced by the scheme; but, on the other hand, it would be very wrong to hold that he has acquired by it a priority over every one else."

The trustees defendant had no right, in the present case, to waive and condone defaults of principal and interest upon plaintiff's bonds; they had no right, as against him, to assent to and recognize a new mortgage given priority over his; they had no right to divert to that new security money applicable by the existing contract to the payment of his bonds. Theoretically, all this the trustees admitted. In their letter of March 4, 1882, they explicitly promise not to apply any of the proceeds of the sinking fund otherwise than to the purchase and redemption of the first mortgage land-grant bonds of said company; and in their answers they admit his right as a non-assenting bondholder to his due proportion of principal and interest upon his bonds out of the proceeds of the land-grant; and yet they sought to reduce that due proportion by a prior application of more than \$100,000 upon the preferred mortgage. They sought to justify this in various ways. It was argued that, since the scheme of reorganization was tantamount to, and took the place of, a distribution after foreclosure, and on such distribution a court of equity would prefer certain debts and obligations over the mortgage bonds, the trustees were justified in giving a similar preference, and the \$400,000 mortgage covered such claims and no others. To this there are several answers. The trustees are not a court of equity, and have no right to award preferences; least of all, to anticipate what such a court, with the facts all before it, would or would not do. But there is no preferred mortgage which has actually taken effect, or superseded the original mortgage. The whole scheme of reorganiza-

Distribution
under scheme
of reorgan-
ization.

tion is *in nubibus*, and simply proposed and inchoate. The new mortgages are held in escrow, and never yet have taken effect by delivery. On the contrary, the bondholders who have exchanged preserve their old bonds as unpaid and uncanceled, and living obligations of the company, and upon them thus existing the land proceeds must be applied, and not upon a preferred mortgage held in escrow, and which never may become operative through failure of the conditions of delivery.

Nevertheless, let us discover, if we can, what indebtedness the preferred mortgage was intended to secure. The facts are in a state of unusual doubt and confusion. In a supplementary brief the plaintiff's counsel points out five different statements or claims made in the record as the basis of that mortgage. The whole record is meagre and confused, and makes our steps perilous; but as I have once already taken the facts from the defendant's brief, I shall assume now that the debts secured by the preferred mortgage are those stated in the formal scheme of reorganization which the trustees approved. It has been suggested that we ought to take it from the referee's report; but the defendants' answers are conclusive admissions. They, in terms, aver that the scheme the trustees approved and seek to carry out is that a copy of which is attached to their answer, and the referee himself finds and identifies that precise "plan." His description of it is very general, but not at all contradictory of its precise terms as admitted in the answers. We do not err, therefore, in relying upon that.

The first two items are the sum of \$71,218.15, for interest on funded coupons, under scheme of July 1, 1875, and the sum of \$24,000 to those who did not fund their coupons, but whose interest upon the certificates remains unpaid. This is an effort to secure to interest upon interest a preference, not only over coupons later maturing, but over the principal of the mortgage itself.

Whatever else may be said about it, we may safely assume that it could have no such preference or priority. The next item is for holders of land-income notes,—\$280,000. So far as these represent an expenditure for completing the road, which is about one-half of the total, it is not at all certain that any court would award a preference. In *Dunham v. Cincinnati, P. & C. R. Co.*, 1 Wall. 254, a mortgage on the road built and to be built was given its priority of lien upon a part thereafter constructed at the cost of the contractor, and under an agreement that he should retain possession until paid. Our own views of such preferences have been recently expressed (*Raht v. Attrill*, 106 N. Y. 423), and we decided that the lien of a mortgage attaches, not only to the land in the condition in which it was at the time of the execution, but as changed or improved by accretions or

Interest on
coupons not
entitled to
preference.

by labor expended upon it, while the mortgage was in existence; and creditors whose debts were created for money, labor, or materials used in the improvement acquired no legal or equitable claim to displace or subordinate the lien of the mortgage for their protection. So far as the income notes represented the \$150,000 of interest coupons which matured in 1875, and which the contractors bought, several suggestions occur to us. While it may be that the overdue coupons bought by the contractors before 1875 were purchases, and not payments, because the then owner of plaintiff's bonds assented to the arrangement, no such fact is proven as to the purchase of 1875. As to those coupons there is not a word of evidence that those who accepted their money made or intended a sale. *Union Trust Co. v. Monticello & P. J. R. Co.*, 63 N. Y. 311. Those coupons, as against the bondholders, must be regarded as paid. In *Ketchum v. Duncan*, 96 U. S. 659, where modifying circumstances were shown, and the transaction was regarded as a sale, there was yet a very formidable dissent. But conceding that there was a sale, yet these coupons in the hands of the contractors were not entitled to any preference. *Dunham v. Cincinnati, P. & C. R. Co.*, *supra*. They were bound by their contract to buy them, and as holders stood simply like the others. On the basis that the reorganization is meant to be the equivalent of a distribution on foreclosure, so as to open the question of equitable preferences by the court, and such "arrangement acts" are a species of "bankrupt acts" (*Canada S. R. Co. v. Gebhard*, 109 U. S. 535, 541, 14 Am. & Eng. R. Cas. 581), the mortgage explicitly forbids any such preference. The provision in article 10 of the mortgage, for payment in the order of maturity, relates apparently to the disposition of the earnings of the road, and to a case not of ultimate distribution. The final item going to make up the preferred mortgage is an estimate of interest likely to accrue before settlement on the previous items. We discover, therefore, no ground, legal or equitable, upon which the preferred mortgage can stand as against the plaintiff, and the judgment as modified by the general term was right, unless those modifications, upon the plaintiff's appeal therefrom, should be deemed erroneous. Our consideration of that subject has led us to the conclusion that those modifications should be sustained.

There is an express finding that the trustees, though acting erroneously, proceeded in good faith. It would be difficult to sustain that finding were it not for the fact that their omission to make payments upon plaintiff's bonds until after he had sued has a reasonable explanation. He claimed more than was his right. He sought not only to defeat the effect of the reorganization upon his bonds, but to make that scheme the means of acquiring an undue pref-

Coupons of
1875 held to
be paid.

Personal
liability of
trustees.

erence for himself. He claimed to stand as if the whole assenting first mortgage bonds had been extinguished, and the proceeds of the land grant and income from earnings were devoted to the few non-assenting bonds alone, and so sought payment in full by reason of the sacrifices of others. He failed in that effort deservedly, and the omission to pay had some excuse in his exorbitant claims, and his hostile attitude. We are disposed, therefore, upon the finding of the referee, and the explicit provisions of the mortgage, to approve of the ruling of the general term that judgment should go against the trustees as such, and not personally. More doubt has attended our reflection upon the question of an order to continue the foreclosure, but the complaint is scarcely framed for such relief, and the proofs indicate that it might merely work mischief to one party without producing benefit to the other, and so we concur in the modification made in that respect.

The judgment of the general term, and the order denying the motion to correct and resettle the judgment, should be affirmed, without costs in this court to either party as against the other.

DANFORTH and PECKHAM, JJ., concur. RUGER, C.J., and EARL, J., dissent. ANDREWS, J., dissents on the ground that the point that the contractors were bound by their contract to pay the interest coupons as their own debt is contrary to the specific finding which is supported by evidence. It is manifestly improper to affirm the judgment on a question of fact contrary to the finding.

GRAY, J. (*concurring*).—In this case, which is for the second time presented to the court upon reargument, I agree with Judge Finch's opinion in holding that the general term were right in modifying the judgment so that it should be against the trustees as such, and not personally.

As to the point raised by the defendant's counsel that there was an absence of necessary parties, I do not think it is tenable, and I agree with the views in that respect which were expressed in the opinion at general term. The new preferred bonds represent the land-income notes; and, the trustees being made defendants with the Wisconsin Central R. Co., all the parties are before the court who are necessary to an adjudication upon the plaintiff's cause of action.

As to the objection raised by the defendant's counsel to the jurisdiction of the court below, I fully agree in the views expressed in Judge Finch's opinion. To be available as a defence it should have been alleged in the answer, or suggested upon the trial. Neither course being taken, the parties must be deemed to have waived it, and to have submitted themselves to the jurisdiction of the court. The

Parties to
action.

Suit pending
in another
state.

cause of action was one cognizable in itself by the court, for it was based on an alleged violation by the trustees of their duty towards the plaintiff, as defined by the terms of the trust deed; and the issue formed was, in fact, as to what were the plaintiff's rights under a construction of the provisions of that instrument. Nor do I think that it is for this court to say on appeal, the objection not being taken by pleading or motion in the trial court, that the trial court should, *ex proprio motu*, have dismissed the complaint.

As to the main question in this case, which turns upon the transactions underlying the creation of the new mortgage, and the issues of preferred and serial bonds secured thereby, and their effect upon the plaintiff's rights as an original first mortgage bondholder, I take a view somewhat different from that expressed in Judge Finch's opinion, as rendered upon the prior hearing; while concurring in the result that the judgment must be affirmed. The first mortgage, which was executed in 1871 by the Wisconsin Central R. Co., covered all the company's land grant, among other things; and some of its clauses provided for the application of the proceeds of the sales of land towards the formation of a sinking fund in the trustee's hands for the security and ultimate redemption and cancellation of the first mortgage bonds. Inasmuch as the making of this mortgage and the issuance of the bonds themselves were designed to obtain the means wherewith to construct the road, a provision was inserted looking to the possibility of the company's treasury being exhausted, and its consequent inability to meet its interest obligations on the bonds. The payment of interest was to be made by the company from the proceeds of the sales of bonds and the earnings of the road; and the fourth article of the mortgage prohibits the appropriation of any part of the proceeds of land sales to the payment of interest on bonds, unless the treasury be first exhausted. Upon the happening of the event contemplated, it is then specifically provided that the company shall execute to the trustees, for the security of the bondholders, a 7 per cent income bond, to an amount equal to the advance made by the trustees from the sinking fund; which should be entitled to interest before the application of the earnings of the road to the stockholders. And by a further provision this income bond was to be redeemed by other bonds of the company, bearing the same rate of interest, but secured by a second mortgage of the premises described in the first mortgage.

Payment of
coupons from
land fund.

A contract was made by the company for the construction of its road, under which the contractors were to receive all the bonds and stock of the company, and all the earnings of constructed road during construction. The company retained only

its franchise, and the contractors assumed the entire responsibility of raising moneys by sale of these securities. The company never received any money during the period of construction, and never paid out any. The contractors sold the bonds they received, and, as coupons matured on them, took them up. These facts appear in the testimony of the defendant Abbott, and are undisputed. Matters proceeded in this wise until December, 1874, when it appears that the contractors claimed to hold against the company upwards of half a million of dollars, represented by these coupons. At this juncture, they professed inability to advance further moneys, and the January interest was unprovided for; so the sinking-fund was resorted to for relief. Such resort as was then had, in my view of the case, was improper, if it was not illegal. The conditions did not exist which permitted it, and, in fact, it was done for the relief of the contractors. By their contract they had the possession of the road, and were to operate it for their own benefit; that is, they were to receive all of its earnings during the period of construction. Obviously, the effect of such arrangement was to leave the company without any sources of revenue, and the result would be an inability to meet any obligation continuing from the period of organization until the termination of the contract. Thus it could not be said that the treasury became exhausted in December, 1874, as was required by the fourth article of the mortgage as the prerequisite for the application of the proceeds of land sales to the payment of interest on bonds. But this article assumed the existence of a condition of affairs wherein the company stood under the obligation to pay the interest, and not, as was the case here, the contractors themselves. And this brings me to the point of difference between Judge Finch's opinion and my own, which I have adverted to as existing; which does not, however, affect the conclusion, but which, in my judgment, strengthens it. The legal effect of the arrangement between this company and the contractors was, as between them, to render them the debtors for the interest maturing during the time the contract was in force, and their purchasing or taking up the coupons was, in fact, the payment or extinguishment of the coupons. The proceeds of the sales of the bonds and the earnings of the road were the stipulated sources for the payment of the accruing interest during the construction of the road, and those sources, by the contract of the parties, were made over to and conducted into the hands of the contractors. They had agreed to pay the interest during their possession, and they were to reimburse themselves for that item of outlay, as they had to do for any other expenditures in their undertaking. Nor is the suggestion that they paid these coupons as agents for the company sound in principle, for it would not be

in accord with the legal or fair meaning of the contract between the parties. It would also seem that, if agents, yet having the possession of all the principal's estate, a payment of an obligation of the principal of such a nature would be presumed to have been made from the property in the agent's hands, and would extinguish the obligation. But I cannot agree to the suggestion. The contractors, in legal contemplation, as I think in fact, assumed the payment of the coupons during construction. The bonds which they received, by reference to the mortgage, carried notice to them of the provisions of the mortgage; which, in its fourth article, provided that, "during the construction of the said railroad hereby mortgaged, the interest on the bonds intended to be secured hereby shall be paid out of the earnings of the said road and the proceeds of the sales of the first mortgage bonds; and no part of the proceeds of the sale of land embraced in this mortgage, or intended to be, shall at any time be appropriated to the payment of interest on said bonds unless the general treasury of the company shall be first exhausted." The arrangement, therefore, which trustees and company united in making, with the object of securing this claim of the contractors for coupons paid by them, by the assignment of the contents of the sinking-fund from the possession of the trustees to a third party, was illegal; for they were as absolutely dead in law as though paid directly by the company over its counter, and the assignment was a direct violation of the agreement in the mortgage.

Coming to the consideration of the payment of the \$150,000 of interest, about maturing in January, 1875, on the bonds, the situation, as between company and contractors, was that it was a liability which the contractors were still bound to provide for, and which the company could not be supposed to be obligated for. Of course, as between the company and third parties holding the bonds, the company was bound for the January interest; but if such had been enforced against the company, and the trustees had simply aided the company by advancing, from the land sales, proceeds constituting the sinking fund, the company would have had an offset against the contractors, and the sinking-fund would have been protected by the obligation of the company in its income bound, as contemplated in the article of the mortgage referred to. But what was actually done was to help the contractors by assigning over the whole sinking-fund, to be held as a security for the payment of their claim for paid coupons, and for the advance by one or more bondholders of moneys to meet the coupons to fall due. This was clearly without warrant in the law, and of this illegality the bondholders, who advanced the funds to pay future coupons, had notice through their bonds

Payment of
coupons of
1875.

and the provisions of the mortgage, and their knowledge of the facts as to the contractor's claim. It is true the trustees received from the company an income bond and a second mortgage for this assignment by them of the sinking-fund, and hereafter I shall advert to the fact in connection with the facts of the so-called "reorganization."

The defendants admit that the contractors were vitally interested in preventing a default and its consequences, and they say that they themselves set about raising the necessary funds to care for the January coupons; but they could not, as counsel claim, use the coupons in their possession, for they were in fact paid as to the company. However, the moneys were raised by the concert of action between contractors, company, and trustees, and matters went on until the foreclosure action was commenced by the trustees upon the default of the company in July, 1875, in December, 1875. Subsequently, and pending the action, the trustees entered upon the property and took possession under that mortgage. While in possession the so-called plan of reorganization was proposed and received the acquiescence of the trustees. It was in reality but a plan for refunding the obligations of the company, and it was attempted to be consummated without the consent of all the bondholders, or through the compulsory process of a decree and sale. Under this plan a new mortgage was executed on the property, and preferred bonds were issued and given in exchange for \$400,000 of claims against the company, variously described as consisting in land-income notes, in payments to equalize interest on funded and unfunded coupons under some scheme designated as the "scheme of July 1, 1875," and in a sum to cover future-accruing interest on these items. The other bonds secured by this new mortgage were subsequent obligations to these preferred bonds, and were issued to take up the prior first mortgage bonds; the details of that scheme not being necessary to describe, in view of Judge Finch's fuller opinion. I utterly fail to find any warrant in law, under the mortgage which defined the duties and powers of these trustees, for their consent to and participation in such a scheme, as by their answer is admitted. These claims were not entitled to precedence or to priority of payment over the first mortgage bonds. For reasons I have stated, the \$280,000 of land-income notes, issued against the trust created by the sinking-fund proceeds, to aid the contractors, were not preferred debts of the company; and for reasons stated in Judge Finch's opinion, which I shall not repeat here, the balance of the \$400,000 was equally not. At most, and overlooking the questionable legality of the transactions out of which they arose as claims against the company, they were entitled to the security of the fund pledged as collateral. How could they deserve

protection to the extent of being secured by a prior lien on the mortgaged property? The very terms of the mortgage contemplate no such possibility, and expressly provide that the trustees shall receive for their advances from the sinking-fund to pay interest, which the company has not the means to pay, and to secure the first mortgage bondholders, whose security is thus impaired, an income bond, to be redeemed by other bonds secured by a second mortgage of the premises. The assignment, by the trustees, of the sinking-fund recognizes this distinctly. Nor did the holders of the land-income notes, by surrendering the proceeds of the land-grant sales in their trustees' hands, thereby become entitled to any priority over the first mortgage bondholders in equity. For, again assuming the legality of the transactions underlying the issue of these notes, the relinquishment of the specific security for their repayment of itself is ineffectual to promote their claim over that of the first mortgage bondholders, in the absence of the consent of all parties. No rule of law recognizes any such right, and I am aware of no principle of equity upon which a party may become preferred as a creditor over another by a voluntary surrender or relinquishment of his security; and such this must be deemed to be, in the absence of the consent of every prior bondholder, or of proceedings had *in invitum*. The trustees should have proceeded with the foreclosure action, and they had no power to waive subsequent defaults, and to release the company from its obligations to their *cestuis que trustent*, and from causes of action, as they did in 1879. In changing the contract by releasing the company and in consenting to a new mortgage, under which the claims of their *cestuis que trustent* were deferred in order of payment, the trustees violated their duty to these plaintiffs, and rendered themselves amenable to this action. They were vested with no such discretion as would authorize them to change or impair any legal right of the plaintiff. The mortgage did not confer any such authority, and the consent of every bondholder could not do so. Their duty to the bondholders was to them severally, and they were not at liberty to follow the advice or wishes of the majority, being still liable to the minority for a faithful administration of their trust. *Sturges v. Knapp*, 31 Vt. 1. With the motives of the plaintiff we are not concerned if he has legal rights which have been disregarded and which his trustees' action threatens to disregard.

The argument that these preferred bonds worked no harm to the original bondholders, I do not regard as sound. They do not equitably represent debts which are entitled to priority of payment. Their issue, and payments upon them of interest and of principal, are not within the terms of the original first mortgage, which represents the contract between company, trustees,

and the holders of bonds, and are distinct departures from that contract. All that instrument contemplated, in the event of the application of the proceeds of land-grant sales to the payment of interest when needed by the company, was that an income bond should be given by the company to the trustees, ultimately to be redeemed by the issuing of bonds of the company, secured by a second mortgage. It is plain that the possession by the trustees of such an income bond, the interest on which was payable before payment to the stockholders, operated as amply as a security for the first mortgage bondholders as they could possibly in the nature of the exigency expect.

I have discussed these questions more at length than I had intended, and perhaps more, in view of the elaborate opinion of Judge Finch, than was absolutely necessary, and I shall add no more. I concur in Judge Finch's opinion upon all matters which I have not touched upon here, and I agree in his conclusion—that the judgement and order appealed from should be affirmed.

Mortgage—Reorganization—Estoppel of Manager to Enforce Original Obligation.—Plaintiff, who was a member of the board of managers of a navigation company, held certain mortgage bonds issued by it, and guaranteed by defendant, a railroad company. Owing to the financial embarrassment of the defendant, it was proposed to effect a financial reorganization of defendant's indebtedness. The board of managers of the navigation company accordingly recommended its bondholders to accept a proposition by which the outstanding obligations were to be deposited with a board of "reconstruction trustees," and new obligations were to be issued instead. Plaintiff, as one of the managers of the navigation company, opposed the scheme, and never deposited any of the bonds held by him, or agreed to receive others in exchange therefor, but the circulars and communications issued by the board of trustees contained no notice of plaintiff's opposition. *Held*, that plaintiff's failure to notify the holders of the other obligations, that he was opposed to the scheme did not estop him from enforcing the defendant's liability under its guaranty. *Philadelphia & R. R. Co. v. Love*, Pa. Sup. Ct., April 15, 1889.

Same—Destruction of Bonds Before Issuance—Release of Mortgage.—A railroad company made a mortgage of a branch road, which recited that it had been deemed expedient to fund certain coupons of the bonds secured by second mortgage of the main line, by the issue of scrip convertible into first mortgage bonds. The mortgage recited that the company had made and delivered to the trustees the bonds secured by the mortgage. While the bonds were yet unissued, doubts arose as to the validity of the mortgage, and the bonds were destroyed and the mortgage released. *Held*, that the holders of the second mortgage bond coupons had acquired no right to the issue of the destroyed bonds, there being no contract by the company to issue them.—*Com. ex rel. Hooton v. Wilmington & N. R. Co.*, Pa. Sup. Ct., Feb. 25, 1889.

Same—Stock Issued to State—Rights of Bondholders under Mortgage by State.—A bill in equity averred in effect that the North Carolina R. Co. was incorporated by an act of the legislature of the state of North Carolina, passed January 27, 1849; that the act provided that the state should subscribe for \$3,000,000 of the \$4,000,000 authorized capital stock of the com-

pany; should be entitled to appoint eight of the twelve directors of the company, and should be entitled to vote by an official proxy upon its capital stock at all stockholders' meetings; that the state took the stock, and has always exercised its rights to appoint directors and vote; that the state created a statutory mortgage upon the shares of the stock, to secure certain construction bonds issued by it; that subsequently it created a second statutory mortgage upon its shares of stock, to secure an issue of bonds, of which the bonds in suit are a part, and issued \$2,500,000 of such bonds, and sold them to the public; and that thereafter, September 21, 1871, and while the railway company was earning and paying 6 per cent per annum upon its capital stock, and while the state was in default in paying the interest on the second mortgage bonds, the defendant, with full knowledge of the rights of the second mortgage bondholders, took a lease of the railway at a rental merely sufficient to pay the interest on the first mortgage bonds, and has since been in possession of the property, and in receipt of earnings therefrom largely in excess of the rental. The bill was filed by the complainant for himself, and in behalf of other holders of the bonds, to compel the defendant to account for the earnings of the leased railway property in excess of the rent reserved in the lease. The defendant demurred to the bill. *Held*, that the suit could not be maintained, in the absence of fraud, on the ground that the state of North Carolina was invested, by the legislation under which it became a stockholder of the railway company, with complete control of the affairs of the company; that by the hypothecation of its shares to the second mortgage bondholders, it impliedly agreed to become a trustee for them, charged with the duty of exercising its power of control so as to preserve the earnings of the railway, and appropriate them to the payment of the bonds; that consequently the earnings were a trust fund for the bondholders; that by permitting the lease by the railway company to the defendant the state consented to a diversion of the trust fund; and that as the defendant is the recipient of a trust fund, with notice of the rights of the *cestuis que trustent*, it must account for such of the fund which has come to its hands as is not applicable to the payment of interest to the first mortgage bondholders. *Gibson v. Richmond & D. R. Co.*, 37 Fed. Rep. 743.

Same—Validity of Release—Recital of Record of Mortgage.—The fact that a release recited that the mortgage was recorded in Mortgage Book No. 30, whereas it was in fact recorded in Book No. 20, does not invalidate the release when the mistake is clearly a clerical error (there being at the time of registration no Book No. 30) and the mortgage is otherwise sufficiently described so as to leave no room for doubt as to what mortgage was released. *Com. ex rel. Hooton v. Wilmington & N. R. Co.*, Pa. Sup. Ct., Feb. 25, 1889.

NELSON

v.

HAYWOOD COUNTY.

(Tennessee Supreme Court, June 7, 1889.)

Municipal Aid—Subscription to Stock—Amendment to Constitution—Completed Contract.—When, under a statute authorizing a county to issue bonds in aid of a railroad upon a majority vote in favor of the proposal, an election has been held, and an order has been made by the county court directing the chairman to subscribe for the stock upon the books of the company, and reciting that the president appeared before the court and accepted the subscription on behalf of the company, the contract is completed, and a constitutional amendment adopted on the day following the making of the order, which declares that a three-fourths vote shall be necessary in the case of municipal aid elections, has not the effect of abrogating the statute authorizing the election and the proceedings thereunder.

Same—Authority to Subscribe to Stock—Issuance of Bonds in Aid of Construction.—A statute which authorizes a county court to hold an election “for the purpose of ascertaining the sense of the voters of said county, as to the issuance of county bonds in aid of the construction of said railroad,” and upon a favorable vote to issue the same, authorizes the county to issue the bonds in payment of a subscription to the stock of the company instead of donating them.

Same—Irregularity in Election—Estoppel of County to Deny Validity of Bonds.—After a county has delivered aid bonds to a railroad company by the authority of a statute, and has recognized them by the payment of interest for fifteen years, it cannot set up an irregularity in the election against an innocent purchaser.

Same—Conditions Imposed by County Court—Waiver—Validity of Bonds.—A county may waive compliance with conditions imposed by the county court, and it cannot object that bonds held by an innocent purchaser are invalid by reason of an irregularity in the subscription ordered to be made by the chairman of the county court, or in the issuing of the bonds.

Same—Place of Payment—Usury.—The legislature may authorize railroad aid bonds to be made payable at a place outside the state, and when the interest is within the rate authorized by the law of the state where they are payable, although exceeding the legal rate of the state where the county is situated, the bonds are not usurious, and are valid.

Same—Consolidation of Companies—Sufficiency of Notice of Election.—If, at the time when an election as to the issuance of railroad aid bonds took place, a statute authorizing the consolidation of the company with another has been enacted and is in force, the election and the issuance of

the bonds in pursuance thereof are valid, although the notice of the election began to run before the consolidation act came into force.

SNODGRASS and CALDWELL, JJ., dissent.

APPEAL from Circuit Court, Haywood County.

Petition for *mandamus*. The petitioner appeals from an order dismissing the petition on demurrer.

J. R. Flippin, W. H. Rutledge, Spl. Hill and Turley & Wright for petitioner.

A. D. Bright, J. R. Bond, J. W. E. Moore, and Metcalf & Walker for defendant.

DICKINSON, Special Judge.—This is a *mandamus* to compel the county of Haywood to levy a tax to pay coupons upon bonds issued under section 8, c. 55, Acts 1869-70, which reads as follows: "Be it further enacted that the county court of Haywood county is hereby authorized, upon application of the president of the Brownsville & Ohio R. Co., to order an election in said county, to be held by the proper officers, for the purpose of ascertaining the sense of the voters of said county as to the issuance of county bonds in aid of the construction of said railroad, said election to be advertised at least twenty days in all the voting places in said county; and if a majority of all the votes cast shall be in favor of the issuance of said county bonds, then it shall be the duty of said court to issue the same; but if there should not be a majority of the votes cast in favor of the issuance of said bonds, then said court shall not issue them,—the amount of said bonds not to exceed two hundred thousand dollars, and to run not exceeding twenty years, bearing the rate of interest allowed by law at the place where said bonds are made payable." The act was passed February 8, 1870, and upon the following day an order was made by the quorum court in pursuance of said act, and in accordance with its terms, ordering an election to be held on the first Saturday in March, 1870. The election was held on that day, and a majority of the votes was cast in favor of the issuance of the bonds. The return of the officer holding the election recited that, in obedience to the said order of the court, he held an election, previous notice of the time and places and purposes of said election having been given; "said election being opened and held, as aforesaid, in pursuance of said order, for the purpose of ascertaining the sense of the qualified voters of said county as to the issuance of one hundred thousand dollars of eight per cent county bonds, payable at St. Louis, Mo., within twenty years from the date of issuance by said Haywood county, to be subscribed as stock to and used in aid of the construction of the Brownsville & Ohio R.; and said qualified voters were instructed by said notice

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under statute
authorizing
election.

that those who were in favor of the issuance of said bonds should have written or printed upon their ballots or tickets 'Bonds,' and those who were opposed to the issuance of said bonds should have written or printed upon their ballots or tickets 'No Bonds.'"

On the 4th day of May, 1870, the county court of Haywood county, after reciting their previous order, under said act, for an election, and the result of the vote, proceeded as follows: "It is therefore ordered and decreed by the court that the chairman of this court be, and he is hereby, authorized, empowered, and ordered, in the name of Haywood county, to subscribe upon the books of said Brownville & Ohio R. Co. stock to the amount of one hundred thousand dollars, to be paid or liquidated by said county by the issuance of said company of one hundred thousand dollars Haywood county coupon bonds, payable twenty years after date of issuance at the city of St. Louis, Mo., and bearing interest from date at eight per cent per annum, and payable annually; said bonds to be used by said company in aid of the construction of said Brownsville & Ohio R. And the said chairman of the court is ordered to sign and issue to the said Brownsville & Ohio R. Co. said bonds, with coupons attached, upon application of its president, upon the following conditions, to wit: First that said railroad company shall take said bonds at a par valuation, and shall issue for the same, to said county, certificates of stock in said company equal in amount to the amount of bonds received hereunder, which said certificate or certificates of stock shall entitle the holder or holders thereof to all the rights, privileges, benefits, and immunities conferred upon other stockholders in said company. Second. Before said bonds are issued the said Brownsville & Ohio R. Co. shall exhibit to said chairman such an amount of *bona fide* and solvent stock, subscribed in Haywood county, as will be sufficient, in addition to three fifths of the one hundred thousand dollars herein ordered, to prepare the road-bed of said railroad for the iron and rolling stock from Brownsville to the Dyer county line. Third. Said bonds not to be issued before May 20, 1870. And thereupon came into open court J. D. Smith, president of said Brownsville & Ohio R. Co., having been thereunto previously authorized by the board of directors of said company, and accepted in the name of said company, the one hundred thousand dollars of county subscription herein ordered, and the issuance of said county bonds, upon the conditions herein imposed."

Upon the following day, May 5, 1870, our present constitution wentin to effect. Article 2, § 29, provides: "... But the credit of no county, city, or town, shall be given or loaned to or in aid of any person, company, association, or corporation,

except upon an election to be first held by the qualified voters of each county, city, or town, and the assent of three fourths of the votes cast at said election. Nor shall any county, city, or town become a stockholder with others, in any company, association, or corporation, except upon a like election, and the assent of a like majority."

Under an act passed February 17, 1870, which was 16 days before the election, and after the notice for said election, which required 20 days, began to run, the Brownsville & Ohio R. Co. became consolidated with the Brownsville & Holly Springs R. Co., under the corporate name of Holly Springs, Brownsville & Ohio R. Co. This had in view the building of a line from a point in Kentucky, by way of Brownsville, as contemplated by the first company, and continuing to Holly Springs, in the state of Mississippi. The consolidation took place, and the said bonds were issued to the consolidated company after the constitution of 1870 went into effect. Petitioner avers that the county of Haywood has, for more than 15 years, recognized the validity of the bonds by levying, assessing, and collecting a tax to pay the interest coupons, which have been regularly redeemed up to the year 1886, and that some of the bonds have been paid by the county. She further avers that she is the owner and holder, for a valuable consideration, in due course of trade, before maturity, of the coupons described in the petition, which were a part of said issue of bonds, and that the county of Haywood refuses to pay the same, and to levy any tax for that purpose, as it is in duty bound under the law to do.

The questions to be determined by us are raised by demurrer, the grounds insisted on being—First. That the power to issue the bonds was abrogated, by the constitution of 1870 going into effect, before it was exercised under the enabling act, and that the bonds reciting upon their face the act under which they were issued, and being issued April 7, 1871, affected all holders with the infirmities existing in them by the effect of the present constitution. Second. That the act only authorized their issuance to the Brownsville & Ohio R. Co., and therefore the issuance to a consolidated company, formed by virtue of a law which did not go into effect until after 8 of the required 20 days' election notice had run, was unauthorized and void. Third. That the act authorizing the issuance of bonds bearing interest at the rate allowed by law at the place where they were made payable was, for that reason, unconstitutional. Fourth. That the bonds bearing 8 per cent interest on their face are usurious, and no suit can be predicated upon them.

It is claimed by the county, and it is unquestionably the law,

that the constitution of 1870, which went into effect on the 5th day of May, 1870, abrogated and annulled the act of February 8, 1870, authorizing the county of Haywood to issue the bonds in question. Const. 1870, art. 2, § 29; *Norton v. Commissioners of Brownsville*, 129 U. S. 479; *Aspinwall v. Commissioners of Daviess Co.*, 22 How. 374. This general principle is

Contract for aid being completed was not abrogated by constitutional amendment.

so well settled and so generally recognized as to make a further citation of authorities unnecessary. If the power has not been exercised, and no binding contract or agreement has been entered into before the annulling constitution goes into effect, then the exercise of such power thereafter is unauthorized and void. *Wadsworth v. Supervisors of Eau Claire Co.*, 102 U. S. 534; *Buffalo & J. R. Co. v. Falconer*, 103 U. S. 826, 2 Am. & Eng. R. Cas. 593; *Town of Concord v. Portsmouth Sav. Bank*, 92 U. S. 630; *County of Moultrie v. Rockingham, etc.*, Sav. Bank, *Ib.* 635. No case has been cited holding that the power to issue bonds or make a subscription, exercised after the annulling law went into effect, was extinct, and the act thereunder void, which is not unconditionally based upon a condition of

Authorities examined.

facts showing either that the right to exercise such power did not accrue, or that no agreement, competent to be made, to exercise such power, had been entered into before such repealing law went into effect. In *Aspinwall v. Commissioners of Daviess Co.*, 22 How. 375, the court says that the charter of the company provided "that it should be lawful for the county commissioners, through which the road passed, to subscribe for stock on behalf of the county at any time within five years after the opening of the books of subscription, if a majority of the qualified voters of said county at an annual election shall vote for the same." The vote was had authorizing the subscription, but no subscription was made before the new constitution took away the power. The court held that, until the subscription was made, nothing was binding, and therefore no rights could have vested before the power to subscribe was taken away. The vote only clothed the commissioners with a power, and this power had never been exercised before it was taken away. In *Town of Concord v. Portsmouth Sav. Bank*, 92 U. S. 629, the act authorizing a vote upon "a proposition to appropriate moneys" to "aid in the construction" of a railroad, the court held that the mere vote was not an appropriation, and that "the town was not authorized to make it, until the railroad was located and constructed through the town." The vote was taken authorizing the appropriation, but by the terms of the act, as construed, this was a mere authorization to make an appropriation after something had first been done. Before the road was located and constructed the power to ap-

propriate was taken away. The court said: "We do not say that the new constitution could annul or impair any contract that was made between the town and the railroad company, during the time in which the town had authority to make it. . . . The town voted on the 20th day of November, 1869, that it would make a donation, provided the company would run its railroad through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation. But the town was not empowered to make the donation until the road was located and constructed through the town." No such condition upon the exercise of the power to issue or contract to issue the bonds by Haywood county existed, but the act says: "If a majority of all the votes cast shall be in favor of the issuance of said county bonds, then it shall be the duty of said court to issue the same."

In *Wadsworth v. Supervisors of Eau Claire Co.*, 102 U. S. 534, the act declared that "if a majority of the ballots cast in any of said counties be for railroad aid, the county board of supervisors of said counties shall have power, by resolution, to cause to be issued bonds," etc. The act authorizing the levy of taxes to pay the interest on said bonds was repealed, and the supervisors thereafter refused to issue the bonds. The court held that in this case there was "no binding agreement or contract" between the railroad company and the county, by which the county became legally bound, through its board of supervisors, to execute and deliver the bonds, and that the act, "neither in express words, nor by necessary implication, made it imperative upon the board of supervisors to issue bonds in pursuance of the popular vote. . . . As the statute only declared that the supervisors should have power, by resolution, to cause bonds to be issued when the people voted in favor of railroad aid, we are not at liberty to say that the legislature meant such vote to be a positive command to exercise that power, without regard to the circumstances arising after the expression of the popular will." The court further says that, admitting that it was a positive mandate, yet it could be revoked by the legislature at any time "before the bonds were in fact issued, or before the county came under a legal obligation to issue them." And again it says that the supervisors did not, prior to the repealing of the act, "assume to impose any legal obligation upon the county, either by an actual issue of the bonds, or by an agreement to issue and deliver them upon the completion of the road through the county." In *Buffalo & J. R. Co. v. Falconer*, 103 U. S. 821, 2 Am. & Eng. R. Cas. 593, the law prescribed that the petition of the tax-payers authorizing commissioners to subscribe for stock might be conditional, and that the condition would bind the railroad company. The petition contained the condition that

the subscription should not be made until the railroad had located and constructed its road to a designated point. The railroad was not constructed until after the act was repealed by the new constitution. The commissioners undertook to make an agreement to subscribe before the condition precedent to the vesting of any right in them to make a subscription had happened, and it was held that the bonds issued in pursuance of such *ultra vires* act were void. The court held that all that was done by the town was to "appoint agents for making a subscription and issuing bonds on the happening of a certain event;" that what had not been done before the revoking constitutional amendment went into effect could not be done afterwards, "unless some valid contract required it to be done. But, as we have shown, no such contract existed in this case." The court distinguished this case from *County of Moultrie v. Rockingham, etc., Sav. Bank*, 92 U. S. 631, showing that in that case there was "authority to make a present subscription, and that this included the power to agree to subscribe, and that the resolution amounted to a subscription, or at least to an agreement to subscribe, which, being accepted and acted upon by the railroad company as such, created a contract between the county and the company."

All of these cases, except the last, are cited and relied on by defendant, and therefore they have been commented upon at length. They do not establish that the delivery of bonds, made either under an act authorizing a subscription or one authorizing a donation, is void, because they are delivered after the annulment of the enabling act, but that this is true only in the event that the right to have the bonds delivered had not vested, either by the effect of the act or by virtue of a valid contract made under it before it became void. In *County of Moultrie v. Rockingham, etc., Sav. Bank*, 92 U. S. 631, the act provided that the supervisors were authorized to subscribe for stock, and issue bonds therefor: "provided, that the same shall not be issued until the said road shall be opened for traffic between the city of Decatur and the town of Sullivan, aforesaid." The court held that the power to subscribe was not fettered by conditions, but that only the payment was postponed until the railroad should be opened, and, "as a greater power includes every constituent part of it, the legislative act empowered the board of supervisors to agree to subscribe preparatory to an actual subscription. The power thus granted was never revoked, unless it was by the new constitution of the state, which did not take effect prior to July 2, 1870. Whatever was done in pursuance of the power before that time, if anything was, could not be affected by the constitution subsequently adopted. Subscriptions or contracts to subscribe, made in pursuance of it before

it was abrogated, remain binding." In that case the board of supervisors informally resolved to subscribe, and the resolutions were referred to a lawyer to be put in form, and subsequently were entered by the clerk upon the records. It provided that "the county of Moultrie subscribed," and that when the railroad "shall be open for traffic" between the city of Decatur and the town of Sullivan aforesaid "there be issued bonds," and that said bonds be delivered to said railroad company in full payment of the subscription of said county so made as aforesaid. There was no further subscription. None was made on the books of the company. The court says: "A subscription on the books of the company was unnecessary, for that which amounted to a subscription had been made in December, 1869. . . . The resolution to subscribe was its own act,—its immediate subscription." On the point that an actual subscription is not necessary, the court cites authorities. Page 634. The opinion proceeds: "And if this conclusion could not be reached it would make but little difference to the present case; for it could not be doubted that the action of the board was at least an undertaking to subscribe, and this was assented to or accepted by the railroad company. The resolutions were entered of record by the clerk and president of the railroad company, and the company made an appropriation of the bonds to be received in payment for the subscription, by a contract made on the 15th of April, 1870. In either aspect of the case, therefore, there was an authorized contract existing between the county and the railroad company when the new constitution came into operation. No matter whether the contract was a subscription or an agreement to subscribe, it was not annulled or impaired by the prohibitions of the constitution. The delivery of the bonds was no more than performance of the contract."

The resolutions of the Haywood county court ordered the chairman to subscribe upon the books of the company for stock to be paid for by the bonds voted for, and to issue the bonds to the president of the company after the company had complied with certain conditions, which are set out in full in the first part of this opinion. The delivery was not conditioned upon the chairman first subscribing on the books, but upon things to be done by the company, and not by the chairman. No time is fixed for the subscription to be made on the books, and it manifestly was intended as a merely formal act, in pursuance of what the order of the court and the acceptance by the company, based upon the vote of the people, had already accomplished. That the court understood that the subscription was then consummated is evidenced by the fact that the same order authorizing it recites that the president of the railroad company thereupon came into open court, "having been thereunto previously

authorized by the board of directors of said company, and accepted, in the name of said company, the one hundred thousand dollars of county subscription herein ordered, and the issuance of said county bonds upon the conditions herein imposed." The contracting parties evidently understood that the act of subscription was then and there consummated. No actual manual subscription on the books of the company was necessary. *County of Cass v. Gillett*, 100 U. S. 594; *Nugent v. Supervisors of Putnam Co.*, 19 Wall. 247; *County of Moultrie v. Rockingham, etc., Sav. Bank*, 92 U. S. 634. This case is very like, and the facts are even stronger than those set out in the *Moultrie Case*, 92 U. S. 635, for here both of the parties to the contract, then present, understood that it was an offer and an acceptance of a subscription. If the county were here suing the railroad company for a delivery of the stock, predicating its rights upon the assertion that the contract upon the facts stated was completed on May 4, 1870, and the company was denying the proposition, the conclusion against the company would be inevitable.

The contention of the learned counsel for the county is that the aid authorized by the act of 1870 was a donation of bonds, and that the county had no power to subscribe for stock; and this is based upon the fact that the section of the act under which the election was held does not, in terms, provide for a subscription for stock. It is true that the section empowering the county to hold an election "as to the issuance of county bonds in aid of the construction of said railroad" says nothing about stock or subscription. The act in which this section appears is a part of an act which provides for aid to different railroad companies by several counties and municipal corporations by the issuance of bonds; and all of them are expressly empowered to subscribe stock except the county of Haywood, the section applying to Haywood county being silent on that subject. On the part of the county it is argued that this difference was intentional upon the part of the legislature, and that the absence of the express power to subscribe in this section emphasizes, by contrast with its insertion in the other sections, this intention, and clearly establishes that it was the purpose of the legislature that Haywood county alone should donate its bonds, and have no power, express or implied, to contract for any benefit for them. On the other hand, it is argued that there was no reason for such discrimination; that it is contrary to the history of legislation in this state in such matters; and that the issuance of the bonds being the burden assumed by the county, and the stock to be received in payment therefor being purely a benefit, for

Statute conferred power to subscribe for stock.

which the county assumes no new liability whatever, there is no reason for the strict construction contended for.

In section 17, c. 57, Acts 1869-70, which is the statute authorizing the consolidation of the Brownsville & Ohio and the Brownsville & Holly Springs Railroads, it is provided that "the country of Haywood and the city of Brownsville shall have the same authority to subscribe stock or grant aid to the Brownsville & Holly Springs R. Co. that they may have to take stock in or grant aid to the Brownsville & Ohio R. Co." This act was passed by the same assembly that passed the former act, and they were enacted within a few days of each other. It is insisted for petitioner that this act is a contemporaneous legislative construction of the former act, and that it recognizes that Haywood county had the right to subscribe for stock in the Brownsville & Ohio R. Co. On the other hand, it is insisted that the language embraces alternatives, "subscribe stock or grant aid," and contrasts the different powers granted expressly to the city of Brownsville, and the county of Haywood, respectively, by the former act. There is strength in both positions, and we have given them consideration, but the language of the second act is not sufficiently explicit to disclose any clear legislative intent as to the construction of the former act. At most, it is only suggestive of an understanding of the legislature, and it is susceptible of two constructions. Therefore it is not a certain and reliable aid in construing the enabling act. The county, by the plain terms of the act, was empowered to vote bonds in aid of the railroad. The county now claims that, from the language of this act, the legislature intended to debar it of all right to contract for a consideration for its bonds in the nature of a stock subscription or otherwise, and that the only power bestowed was that of donating the bonds as a pure bounty. The act must be construed now as it would have been if the necessity for its construction had arisen before the new constitution went into effect. In seeking for its true intent, the rights and interests of the county, as they were to be affected by its action under it, are to be borne prominently in mind, for that was the subject-matter legislated upon.

The county, now seeking to annul its bonds, asks for a construction which would have been most harsh upon it at the time the bonds were voted. It would be a most narrow construction to hold that the power granted to vote for bonds in aid of the construction of a railroad could only be exercised in donating the bonds, and that the language used by the legislature absolutely excluded their use in any other way. The act says nothing about donating, and the donation of bonds was a thing quite rare, if not totally unknown in our legislation. No case of a pure donation in this state, under similar or, indeed, any

language, has been called to our attention. Aid, by use of the bonds, might have been extended in at least two other ways besides donation, namely, by a loan of the bonds, or by giving them in payment of stock subscription. The latter has been the usual method which prevailed in this state. Why, then, should it be said that the legislature meant that, of three ways, the one necessarily must be followed which was least to the interest of the county, and most at variance with the practice in this state? The only argument in favor of such construction is that at present the county is interested in having that construction put upon the act which would have been most detrimental to its interest when it was passed. It would require unequivocal language to indicate that the legislature intended that county bonds should be donated, to the exclusion of all other uses of them, in aiding railroad construction. The case of *Town of Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, is relied on as an authority for the construction contended for. The question of the construction of the language authorizing a donation was not the point decided, but whether the word "subscriptions" included donations. The court said that the language of the legislative act in question authorized a donation, but that was not a contested point in the case. The language, however, was "to appropriate money to aid in the construction." An appropriation of money by government in aid of public enterprises may well carry with it the idea of a subvention, but the voting of bonds in aid of construction does not necessarily imply a bounty, as is contended in this case. In construing such language, the interest of the county voting the aid, and the prior history of legislation on that subject, would control in the construction.

The Concord Case, above cited, is not in any sense an authority on this point; for the language is different, and the question of whether or not it implied a donation was not in contest. To say that the language of our act necessarily meant a donation would be a forced construction. To say that it, while authorizing the issuance of bonds, did not intend that the county might not, by subscription for stock or otherwise, contract for a consideration for them, confers no new power upon the county to assume an obligation or onerate itself with a burden. The power to do an act by which it might suffer loss was conferred in authorizing the bonds, and that is the power that is strictly construed. There is no reason for strict construction when the question of receiving a benefit alone is involved. The power to vote bonds in aid of construction carried with it the power to dispose of them by the county in aid of construction in the usual ways, and stock subscription was unquestionably the one generally pursued by towns and counties. In view of the character of our legislation on the subject, and of the consideration that

the power to subscribe for stock, incident to the issuance of bonds agreed by the railroad to be received in full payment of the stock, is purely in the interest of the county, enabling it to take a benefit in exchange for its bonds, without the assumption of any burden or obligation as a consequence of such agreement to subscribe, we are of the opinion that Haywood county had the right to subscribe for stock, be paid for in the bonds authorized to be issued by said act. The voting for the issuance of the bonds, the subscription for stock, and agreement to issue the bonds therefor at a future day, after certain acts to be performed by the company had been done, and the acceptance by the railroad company of the subscription and the agreement to issue such bonds, all constituted a valid, binding contract, which could not be affected by the subsequent change in the constitution.

But if the act be treated as only authorizing a donation, then, inasmuch as it directed the bonds to be issued upon a favorable vote, and imposed no other conditions, and the county agreed to deliver them, and the railroad company assented to it, the rights of the company, even on the theory of a donation, became fixed, and the fact that it consented to a future day for delivery, after the performance of certain acts, would not alter its rights. The legislature had the power to authorize a donation and fix the conditions upon which rights to enforce it should vest. In this respect there is no difference between a donation and a subscription. *Chicago, B. & Q. R. Co. v. County of Otoe*, 16 Wall. 675; *New Buffalo v. Cambria Iron Co.*, 105 U. S. 75. In *Livingston Co. v. First Nat. Bank*, 128 U. S. 126, it is said that, where the statute provides that upon a favorable vote for subscription the county court should issue the bonds and deliver them to the railroad company, this "imposed a plain duty upon the county court, because the statute and the vote, taken together, authorized the subscription and the issue of the bonds, and no formal order by the county court, to do those acts was necessary. . . . The statute left no discretion in the county court, but made it the duty of the court to make the subscription and issue the bonds. The sole duty of the court was to ascertain that the proper vote had been had."

Counsel for defendant contend that, before the donation is completed by delivery, the power to donate may be withdrawn, and that a promise to donate fixes no rights, and cannot be enforced, and that such proposed donation is defeated by the annulment of the act authorizing it before delivery of the gift. No case is cited sustaining this doctrine. Authority to donate by a county upon a vote for a public purpose does not stand upon the same footing as a mere promise of a person to make a present at a future day. An agreement to donate by a county may be irrevocable. In every case cited on this proposition by defend-

ant, whether it was a question of subscription or donation, there was either a condition precedent to the power to contract which had not been fulfilled, before the empowering act was repealed, or the agents authorized to bind the county had not exercised their power before it was annulled. In the Concord Case, 92 U. S. 630, where the act was construed as empowering to donate, the court declares that the towns, before the time arrived when they were authorized to donate, "had no authority to make a contract to give," but it distinctly declares that, if an agreement to donate had been made after that time had arrived, it would have been inviolable. The only time fixed by the act in this case was the vote upon 20 days' notice. After that the county either had a right to agree to deliver the bonds at a future day, or it had no rights in the premises, the vote itself fixing the rights of the company. In either case such rights, whether fixed by the vote or the contract by the county, was vested before the new constitution went into effect.

It is contended that the rule that a power conferred upon a county, to contract for or vote upon a particular proposition, would not authorize it to contract for or vote upon another and different proposition, and that the recital of the officer holding the election that the vote was upon bonds to be given in subscription for stock, and the action of the county court, in reference to the stock, evidence an infraction, in this case, of the rule. The order of the county court was that the vote should be "Bonds" or "No Bonds," and the return of the officer shows that this was the proposition actually voted on, and this was in conformity to the act of the legislature authorizing the election. It is not positive, from the officer's recital, that the notice of election actually contained any reference to subscription, but that construction is fairly inferable. If it did, it did not alter the main object of the election, which was to vote bonds in aid of a certain railroad, and this was fully explained in the notice. The City of Attica Case, 56 Ind. 477, is cited as being in point, but the court there held that the entire aim and purpose of the enabling act was violated, and that, under the specious guise of aiding in railroad construction, the object really aimed at was to secure the location of shops, and that there was an entire perversion of the powers granted, and a fraud upon the law. No such state of facts exists here, but the identical road intended by the legislature and the people to be aided was aided, in the very way that the act and the voters contemplated. The power was given to issue the bonds, and the county court was charged with the duty of ordering the election, and determining whether the requisite vote, upon a proper notice, had been cast, and of issuing the bonds. The bonds were issued by them with a recital that

Recognition of
bonds stops
county from
contesting
validity.

they were issued under the act of 1870. The county, after they had been delivered to the railroad company by the authority vested with the powers stated, and after it had recognized them by payment of interest for 15 years, cannot set up an irregularity in the election against an innocent purchaser. *Town of Coloma v. Eaves*, 92 U. S. 484; *Humboldt Tp. v. Long*, Ib. 642; *Dixon Co. v. Field*, 111 U. S. 94, 15 Am. & Eng. R. Cas. 595; *Ander-son Co. v. Beal*, 113 U. S. 238.

It is further said that it is not shown that the conditions imposed by the county were complied with before the bonds were issued. They were not fixed by the legislature as conditions precedent, but existed merely by virtue of a contract with the county. An innocent purchaser was not bound to inquire into their performance. The question presented is similar to one passed upon in *County of Moultrie v. Rockingham, etc.*, Sav. Bank, 92 U. S. 636, as follows: "Now, if it be supposed that the purchaser of bonds with such recitals was bound to look further (the bonds reciting the act under which they were issued) and inquire what was the authority for the issue, where was he to look? Had he looked to the act of the general assembly of March 26, 1869, he would have found plenary authority for a stock subscription, and for issue of bonds in payment thereof. If he was bound to know that the constitutional provision terminated that authority after July 2, 1870, he knew that any subscription made before that time continued binding, notwithstanding the constitution, and that bonds issued in payment of it were therefore lawful. If, then, he had inquired whether a subscription had been made before July 2, 1870, at the only place where inquiry should have been made,—namely, at the records of the board,—he would have found an order to subscribe equivalent to a subscription made, in December, 1869, corresponding with the assertions of the recitals, and declared by them to have been a subscription. He could have made inquiry nowhere else with any prospect of learning the truth. Every step he could have taken assured him that the recitals were true. How, then, can a county be permitted to set up against a *bona fide* holder of the bonds that the authority to make a subscription, with all its legitimate consequences, had expired before the subscription was made, in the face of the recitals and of the county records? Whether it had expired was a matter of fact, not of law, and it was peculiarly, if not exclusively, within the knowledge of the board of supervisors. After having assured a purchaser that their subscription was made in December, 1869, when they had power to make it, it would be tolerating a fraud to permit the county to set up, when called upon for payment, that it was not made until after

Conditions
fixed by coun-
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ance.

July 2, 1870, when their authority expired." In *Livingston Co. v. First Nat. Bank*, 128 U. S. 127, the court says that, the county court having been designated to determine that the conditions existed which authorized the making of the subscription, the fact of the issue of the bonds by the county court estops the county from asserting against a *bona fide* holder of the bonds any mere irregularity in the making of the subscription or the issuing of the bonds. It would be far more aggravated to permit a county to say that it had itself imposed conditions to be complied with before the bonds were issued, and that they had been issued without such compliance. The county had a right to waive them, and it makes no difference as to the validity of the bonds in the hands of an innocent purchaser whether such conditions were waived, neglected, or complied with.

It is sought to defeat the bonds on the ground that they are void on their face for usury. The act authorized them to be made, bearing interest at the rate of the place where they were payable. At that time Missouri had a conventional interest law, and a paper bearing 8 per cent interest on its face was legal in that state. There was good reason to permit such bonds to be made payable at money centres, as this would promote their sale and enhance their value. Such a provision was founded on a sound business reason, and we cannot presume that it was a device to pay usury, as that would be an impeachment of the good faith of the law-making power of the state. It is said that the provision was intended to cover the usual, and not a conventional, rate. The question is whether it is a lawful contract on its face, and this must be settled by the law of the place where it is payable, the legislature having authorized it to be so made. The case of *McKinney v. Hotel*, 12 Heisk. 104, is relied on by defendant, but it is not in point. The act declared unconstitutional in that case was, in effect, the suspension of the usury law of this state for the benefit of one person. It was a partial law. In the case under consideration the state simply empowered the county to do what every person in the state had a right to do. It had nothing to do with our usury law.

It is claimed that the bonds are void because voted to one road and issued to another; the consolidation act not being in force when the notice for the election began to run. There are a number of cases upon this question, and they all go to the point as to whether the act authorizing the consolidation was in force at the time of voting. A number of cases to this effect are reviewed in *Livingston Co. v. First Nat. Bank*, 128 U. S. 115. The voting is the act by which the authority to issue bonds is conferred, and if the consolidating act is then in force it is sufficient.

COMPENSATION FOR LANDS TAKE

The notice has no function except to inform the time, place, and purpose of the election. The judgment is reversed, the demurrer is overruled, and the case is set for further proceedings.

SNODGRASS and CALDWELL, JJ., did not conc
clusion.

BIRMINGHAM AND DISTRICT LAND

v.

LONDON AND NORTH WESTERN R.

(L. R. 40 Ch. Div. 268.)

Construction—Entry upon Lands—Disputed Interest—
of Land-owner.—A, in occupation of land under a building contract, was bound to complete the buildings within a term determinable if the buildings were not completed by the 31st of July, 1885, was informed in 1880 of the promotion of a bill for a railway scheme which would affect the land. A thereupon had an interview with the agent, who told him to suspend building operations till the railway scheme was known—no express agreement to effect the building being come to. In 1883, the company obtained the sanction of the Board of Railways, and on the 31st of July, 1883 purchased from the landlord such an interest in the land as was required; the purchase being made expressly subject to the building agreement. On the 16th of September, 1884, the company sent in no claim, and in January, 1886, the company commenced his action for an injunction, and claimed that the building agreement was subsisting, and that A was entitled to have his interest assessed on that footing. The company had, without complying with the provisions of the Lands Clauses Act, entered upon land of which A was in occupation, he had ground for an action, and that, if brought to trial, the court had jurisdiction to make a declaration of A's interest in the property; and that, although the term named in the agreement had expired, he had an interest in the land, for the purpose of the section to suspend building raised an equity against the company to prevent his ejecting A at the end of the term until he had given notice after notice to complete the building, and that the railway company was subject to that liability.

By a building agreement dated the 5th of [redacted] between a Mr. Boulton of the one part and the [redacted] company of the other part, it was agreed that during the 30th of November, 1875, the plaintiff comp[redacted]

upon a plot of land of $8\frac{1}{2}$ acres therein described for the purpose of building. The plaintiff company were to fence the land, and were to build within the ten years a certain number of houses of a specified description. Provision was made for granting separate leases of the houses as they were completed. In case of default by the plaintiff company the lessor was authorized to vacate the agreement, and to re-enter upon all parts of the land of which leases should not have been granted.

Another agreement of the 5th of April, 1877, was entered into between the same parties, as to a plot of $3\frac{1}{2}$ acres forming part of the same estate. This agreement was similar to the other, except that the term was only six years from the 30th of November, 1875.

By a third agreement, dated the 27th of October, 1879, some modifications were made in the two former agreements as to the class of houses to be erected under them.

The plaintiff company entered upon and fenced the lands, and kept a man in occupation. They built a number of houses and obtained leases of many of them.

Not long after the date of these agreements, it became publicly known that the London & North Western R. Co. intended to apply for an act authorizing them to make a line which would interfere with this property. The agent of the plaintiff company had interviews with Mr. Boulton's agent, and represented that they could not safely go on building while this railway scheme was hanging over them, for that if this railway was made a different class of houses would be required. It was not distinctly shown when these interviews took place, but the court considered the evidence to show that they took place not later than 1880, and that Mr. Boulton's agent told the plaintiff company to stop building until it was seen what became of the railway scheme.

In 1883, the railway company obtained their act, which enabled them to take a part of both those parcels of land, and on the 31st of July, 1883, they bought from Mr. Boulton a strip running through both parcels. This purchase was made with express notice of and subject to the agreements of the 5th of February and the 5th of April, 1877. On the 16th of September, 1884, the railway company gave the plaintiff company notice to treat for the above strip. The plaintiff company sent in no claim, and no further step was taken under the notice. On the 4th of January, 1886, the railway company entered upon and took possession of the strip of land without complying with the provisions of § 85 of the Lands Clauses Consolidation Act, considering that the building agreements were at an end by effluxion of time. The plaintiff company thereupon commenced this action, asking a declaration that as between the two com-

panies the building agreements were subsisting, and that the price and compensation payable to the plaintiff company in respect of the land taken by the railway company which was comprised in the building agreements, ought to be assessed on the footing that the agreements were subsisting; and asking an injunction to restrain the railway company from taking possession of the land until they had complied with the provisions of the Lands Clauses Act.

The action was tried by Mr. Justice Kekewich, 36 Ch. D. 650, who decided in favor of the plaintiff company. He did not grant an injunction, as the railway company had in the meantime given a bond which the plaintiff company were willing to accept as sufficient. The material part of the judgment was as follows: "Declare that as between the plaintiff company and the defendant company the agreements dated respectively the 5th of February, 1877, and the 5th of April, 1877, in the pleadings mentioned, so far as the same related to the lands purchased by the defendant company, are subsisting, and that the price or value of the interest of the plaintiff company in the said lands, and the compensation and damages for severance or otherwise payable to the plaintiff company in respect of so much of the lands respectively comprised in the said agreements as have been or shall be taken by the defendant company, ought to be assessed on the footing that the said agreements are still subsisting. And it is ordered that the bond entered into by the defendant company, dated the 7th of September, 1886, is to be treated as having been given in compliance with § 85 of the Lands Clauses Consolidation Act, 1845." The defendant company appealed from this judgment.

Ince, Q.C., Greene, Q.C., and Clare, for the appellants.

The court ought not to make any declaration in this action as to the plaintiffs' interest, or investigate their title. The proper course for the plaintiffs to pursue is to make a claim under the Lands Clauses Act, and to have the compensation assessed by an arbitrator or a jury, and then to bring an action on the award in which the question of title would be tried. The defendants have now given a bond to the plaintiffs in accordance with the Lands Clauses Act, and that being done, the plaintiffs have no further cause of action in this court. When the bond was given they ought to have discontinued the action. *Brierly Hill Local Board v. Pearsall*, 9 App. Cas. 595; *Doe v. North Staffordshire R. Co.*, 16 Q. B. 526; *Adams v. London and Blackwall R. Co.*, 2 Mac. & G. 118; *London and Blackwall R. Co. v. Cross*, 31 Ch. D. 354, 373; *Reg. v. London and North Western R. Co.*, 3 E. & B. 443. The Judicature Act, 1873, § 24, sub-§ 7, does not help the plaintiffs. It does not entitle them to tack on an irrelevant claim to their claim for an injunction. The whole proceedings

before this action was commenced, were carried on under the Lands Clauses Act. We entered on the land under our purchase of the reversion, the building agreements having expired. Nothing took place between Mr. Boulton's agent and the plaintiff company which could constitute a new agreement extending the time for building.

[LINDLEY, L.J.—Did not what took place create an equity against Mr. Boulton having a similar effect? *Hughes v. Metropolitan R. Co.*, 2 App. Cas. 439.]

That equity only arises in cases of forfeiture.

Romer, Q.C., Warmington, Q.C., Woodroffe, and Alfred Young for the plaintiffs.

The railway company contends that as no definite period of extension was named there was no effectual extension of the time for building. But we prove that Boulton requested us by his agent to stop building, and, after that, he could not have insisted that the agreements came to an end at the expiration of the original periods, but must have allowed a reasonable time for building. We were bound by the agreements to fence the plots, we did fence them, put a man in possession, and apart from the illegal possession of the company we have been in possession ever since, and continued paying rent. Boulton, therefore, could not eject us without giving us an opportunity of building. The railway company is in no better position than he. It had two courses open to it—to claim the landlord's rights or to compel us to sell under the Lands Clauses Act. The company gave us notice to treat as to the land in both agreements, though they now say that only one of them was in force. They say we made no claim, but the only effect of that is to affect the mode in which the compensation is to be assessed.

[BOWEN, L.J.—Might not your making no claim be to some extent evidence that you had no right?]

It could at most only be evidence that we thought we had no right, and the railway company having given us notice to treat cannot be heard to say that we have no interest.

Ince, in reply.

The plaintiffs were mere licensees, and as regards the ground not built upon they were not in possession, and could not require a bond.

[COTTON, L.J.—I doubt whether we ought to allow that point to be raised for the first time at this stage of the argument, and I do not think it is sustainable.]

COTTON, L.J.—This is an appeal from the decision of Mr. Justice Kekewich, and before dealing with the case I will shortly state the facts.

The Birmingham and District Land Co. is a company which had got three agreements from Mr. Boulton and his trustees, who had power to grant leases. The first agreement was dated the 5th of February, 1877, and the second the 5th of April, 1877. The agreement of the 5th of February, 1877, comprised a plot of $8\frac{1}{2}$ acres near Birmingham, of which the plaintiffs got an agreement for a building lease, and that gave them power within ten years from the 30th of November, 1875, to enter upon the land and build, and they were to build within a certain time a certain class of houses. The agreement which is dated the 5th of April, 1877, was a similar agreement relating to $3\frac{1}{2}$ acres of land, and it was for a period of six years from the 30th of November, 1875, so that the second agreement would come to an end in 1881, and the other not until 1885. The third agreement, dated the 27th of October, 1879, only modified the others as regarded the class of houses to be built. There was a provision in the agreements that leases should be granted when houses had been erected, and leases of some of the houses were granted accordingly. There was also a provision which was much relied upon by the plaintiff company, but which appears to me not to affect the case, that after a certain number of houses, producing a certain rental, had been built, the leases of the other houses should be granted at a peppercorn rent. Facts.

Soon after the date of the agreements a railway scheme was started by the defendant company which, if carried into effect, might materially affect these building operations by enabling the defendant company to take part of the lands included in the agreements. In consequence of the probability that the scheme might be carried into effect, meetings took place between Mr. Thynne, the agent for the Boulton trustees, and the officers of the plaintiff company, and although Mr. Thynne says there was no agreement come to between him and the agent of the plaintiff company, and I agree that there was no express contract, yet on the evidence I come to the conclusion that in fact what was said by Mr. Thynne to the agent of the plaintiff company and to the chairman of that company came to this: "Stop the building operations till it is seen what becomes of the railway scheme." The plaintiff company had urged that, if this scheme was carried into effect, not only would parts of the land be taken and the remainder be prejudicially affected, but there must not be houses of the same class as that contemplated by the agreements. It may be material to consider at what time these meetings took place. The officers of the plaintiff com-

pany do not speak clearly as to the time, though they speak clearly as to what was the nature, of the communication, but Mr. Thynne in his evidence does show that it must certainly have taken place before 1881, and therefore before the second agreement, which was to expire earliest, had come to an end.

[His lordship then entered into a detailed consideration of part of the evidence, and summed up by repeating his conclusion that what Mr. Thynne said was to this effect: "Do not go on with the buildings as long as the railway scheme is unsettled and doubtful."]

In 1883 the defendant company obtained an act which enabled it to take a strip of land going through both the $8\frac{1}{2}$ acres and the $3\frac{1}{2}$ acres, and in July, 1883, they bought that strip of land from Mr. Boulton and his trustees. The agreement for sale expressly made the purchase by them subject to the three contracts of the 5th of February, 1877, the 5th of April, 1877, and the 27th of October, 1879. Not only was the contract expressed to be subject to those agreements, but the agreements were set forth in a schedule. Then on the 16th of September, 1884, the railway company gave the plaintiff company notice to treat, but that notice was not followed up by any step on either side. The plaintiff company did not send in any claim to show what interest they claimed, and nothing further was done till February, 1886, when the railway company, as their counsel say, because they thought that by that time these agreements had come to an end, entered into possession without giving the plaintiff company any bond or making any deposit, as required by the 85th section of the Lands Clauses Act. The plaintiffs thereupon brought their action for an injunction, and to have it declared what their rights were, the railway company asserting that the rights of the plaintiff company were altogether gone at the time when the railway company took possession. Mr. Justice Kekewich gave a judgment by which he did not grant any injunction, because the railway company after the action was brought had given a bond which, though not in accordance with the act, the plaintiffs very reasonably agreed to accept as sufficient, but he declared that the agreements were still subsisting, and that the compensation and damages payable to the plaintiff company must be assessed on that footing. From this judgment the railway company appeals.

Several contentions were raised on behalf of the appellants which showed great ingenuity on the part of the counsel who argued the case. The first contention of Mr. Ince

**Power of court
to make declaration estab-
lishing title.**

was that even if the plaintiff company were entitled to an injunction, yet it would be wrong to go on, under the circumstances of the case, to make any declaration establishing their title. He said there were cases which established, that where a railway company has

given a notice to treat under the Lands Clauses Act, this court will not interfere except to grant an injunction against taking possession if the railway company has not done what it ought to do under section 85. Now there are cases to this effect, that when a notice to treat has been given, and a claim sent in, although the parties to some extent may be said, though inaccurately, to stand in the position of vendor and purchaser, yet their rights are only rights given by the act; that any proceedings to enforce those rights must be taken under the act, and that the court will not interfere as it would do in the ordinary case of vendor and purchaser, since the act provides a way of dealing with the matter. That is very different from the present case. There are also cases where a railway company has ineffectually sought to get relief in chancery on the ground that a claim is made against it by a person who has no right at all. That is not the present case. Here the plaintiffs allege that they have an interest, and that the railway company deny their having any, and have acted in a manner which, if the plaintiffs have an interest is unlawful as against them. The cases cited do not support the contention of Mr. Ince that in such a case the court will not make any declaration of right, especially where, as here, the railway company, as regards the plaintiff company, stands in a position independent of the act of parliament, inasmuch as the railway company bought from Mr. Boulton, subject expressly to such rights (if any) as the plaintiffs had under the agreements between them and Mr. Boulton. Therefore, there is a right on the part of the plaintiffs, independently of the Lands Clauses Act, to prevent the railway company who bought with notice of their rights, whatsoever they were, from acting in violation of those rights. In my opinion that contention of the appellants cannot prevail. The railway company bought subject to such rights as the plaintiff company may yet have, and we have to consider what those rights are. I should have thought myself that it would be more convenient to the railway company to have it decided, before they went to a jury, what was the nature of the rights of the plaintiffs, and what the plaintiffs could insist upon. Of course there may be some matters which will have to be considered then, and which we ought not to decide now; but in my opinion it will be right, having regard to the position of the parties, to declare, as far as we can, what the interest of the plaintiff company is.

I have already mentioned the facts of the case, and stated my conclusion on the evidence, that before either of the terms of years mentioned in the agreements came to an end, the communication of which I have stated the effect took place between the plaintiff company and the agent of Mr. Boulton and his trustees. The appellants founded an argument on the special form of the agree-

Equitable interest of plaintiff in land.

ments, which were not agreements that the plaintiffs should for a certain number of years have the land to build upon, but agreements that they should, for ten years, from a past date in one case, and six years in the other case, have liberty to enter upon the land for the purpose of building houses, and it was urged that nothing took place which could have the effect of making a new agreement or extending the old agreements. I quite agree that what passed did not make a new agreement, but in my opinion, what took place between Mr. Boulton's agent (I need not on every occasion refer to the trustees) and the plaintiffs would have prevented Mr. Boulton from bringing ejectment or taking possession of the land as soon as the terms of years limited by the agreements respectively came to an end, it raised an equity against him which would prevent his so doing, and would oblige him, after notice given by him to the plaintiff company, to give them a reasonable time to complete the building operations which had been stopped by the action of his agent. The case of *Hughes v. Metropolitan R. Co.*, 2 App. Cas. 439, referred to by Lord Justice Lindley during the argument, amply supports that proposition. I think, therefore, that this contention of the appellants also fails.

Then as to the notice to treat given by the railway company. There has not been any notice by Mr. Boulton to the plaintiff company to go on with the building, and, in fact, after the sale to the railway company it would be impossible for him, as regards the land taken by the railway company, to give any such notice. As to the rest, he had a right to give the notice, but we need not enter into any question as to the rights between him and the plaintiffs. The effect, in my opinion, of the notice to treat was to put an end to all possibility of building by the plaintiff company on the land comprised in the notice. It was argued by Mr. Clare that what took place between Mr. Boulton's agent and the plaintiff company applied only to such land, if any, as might not be taken by the railway company, but I cannot so understand it. At that time there was no land designated as going to be taken by the railway company, and it would, I think, be impossible to hold that what Mr. Thynne said to the plaintiff company amounted to this: "As regards any land which the railway company do not take you shall have an extended time to build." He gave them a general direction to stop building. The consequence of this may now be different as regards the land taken by the railway company and the land remaining in Mr. Boulton, but as regards the former the effect must be that the plaintiff company were entitled to a reasonable time from the time of the notice to treat. I do not think it advisable to go in detail into the facts of this case, but the accounts which have been put in showing the claim

Effect of
notice to treat.

made for rent as against the plaintiff company after the period when, according to the appellants' contention, all right and interest on their part had come to an end, strongly supports the view which I take of the parol evidence in this case. I do not decide, and I do not think my brothers are inclined to decide, whether, as regards the second agreement (that of the 5th of April, 1877), the time had expired when the railway company took possession. That question will not affect the decree, for the railway company took possession of parts both of the $8\frac{1}{2}$ acres, and the $3\frac{1}{2}$ acres, and it is enough to support their application to the court for relief that the plaintiffs were in possession under those agreements, or one of them, of the land, or part of it, comprised in them.

I will notice another point, which was first brought forward in reply, and on which, therefore, we should have given Mr. Romer an opportunity of being heard if we had thought it necessary. It was said, "the plaintiffs, even if the agreement was still subsisting in their favor when the railway company took possession, were not persons to whom any bond was required to be given."

This is ingenious, but in my opinion wrong. The plaintiff company were in occupation, I will not say whether they were in possession or not. Their agreements gave them a right to enter upon the land in order to build. They, in fact, did enter upon both parcels of land, and they did in fact build upon both parcels, and, more than that, the contract bound them to put a fence round the land, which they did; and although it was shown that this fence was in some parts broken down, still the existence of the fence would be evidence that the plaintiff company were in occupation. Not only so, but they also, as I understand from the evidence, had a man there to look after the land, who lived in a house on the land and warned off trespassers, though of course not always effectually. In my opinion, therefore, the plaintiff company were in occupation of both the plots of land. Now the Land Clauses Consolidation Act, 1845, § 84, says: "The promoters of the undertaking shall not, except by consent of the owners and occupiers, enter upon any lands which shall be required to be purchased or permanently used for the purposes and under the powers of this or the special act, until they shall either have paid to every party having any interest in such lands, or deposited in the bank, in the manner herein mentioned, the purchase-money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein." Then the 85th section empowers the railway company, if they desire to enter before they have complied with the provisions of the 84th section, to do so upon making a deposit and giving a bond, which was not done

in the present case. The plaintiffs were in occupation, and the railway company if they desired to take possession, as they did, were bound before they did so to make a deposit and give a bond to the plaintiffs. In my opinion, therefore, that contention cannot prevail.

In my opinion the plaintiffs are right in their contention throughout, and the appellants, the railway company, are wrong. We think, however, that it would be advisable to make some slight variation in the form of the decree. Lord Justice Lindley will read what he has prepared, but that will not affect the costs of the appeal, because, in substance, we affirm the decision of Mr. Justice Kekewich, though in form we slightly vary it. We doubt whether it would be right to give any direction as to what should be done by the jury. We declare the rights of the plaintiffs, and then trust to the judge to give a proper direction to the jury in order to ascertain what compensation is properly payable to the plaintiffs.

LINDLEY, L.J. —I am of the same opinion, and have very little to add.

Mr. Ince made two points in his opening. First of all he said that the procedure was wrong, that the action was wrong, and that the parties ought to have proceeded under the Lands Clauses Act. Then he said on the merits that the building agreements were not still subsisting when the notice to treat was given. I propose to say a few words upon each of those points.

With respect to the wrong procedure, Mr. Ince relied upon the case of the London and Blackwall R. Co. v. Cross, 31 Ch. D. 354, which decided that this court would not grant an injunction to restrain proceedings under the Lands Clauses Act, on the ground that the person claiming compensation had no interest in the land entitling him to take the proceedings. That point, as a matter of practice, has been settled, and it does not appear to me to apply to this case at all. If any lingering doubt could remain on that point it would be more than removed by the extremely able argument of Mr. Clare, who showed to demonstration that the railway company were entering, not under the provisions of the Lands Clauses Act, but because they had bought the reversion of the lessors' interest in these lands, and they considered the agreement between the plaintiffs and the lessors as at an end, in which case of course the company would have been entitled to enter whether the Lands Clauses Act had been passed or not. In a controversy of that kind it obviously is perfectly competent to the person claiming the benefit of the agreement to bring an action for specific performance of that

Injunction to
restrain pro-
ceedings under
Lands Clauses
Act.

agreement, or at all events, to protect his interest under it, leaving the Lands Clauses Act altogether on one side. I do not say that could have been done if the railway company had proceeded under the Lands Clauses Act, but they did not. That puts an end to the first point as regards procedure.

The second point is the really important one, viz., whether the building agreements of the 5th of February, 1877, and the 5th of April, 1877, were in any sense subsisting when the notice to treat was given on the 16th of September, 1884. The agreement of the 5th of April, 1877, was to have come to an end at Michaelmas, 1881, that of the 5th of February, 1877, ran on to 1885, and clearly was subsisting at the time of the notice to treat. Now it is said that, at all events when the railway company entered, which was not till 1886, both these agreements were at an end, and, looking at the agreements alone, unquestionably the periods of ten years and six years which were mentioned had come to an end before the railway company entered. But that is not conclusive, and the plaintiffs adduce evidence to show that there had been conduct on the part of their lessor which, notwithstanding the expiration of those terms, disentitled him to treat the agreements as at an end.

Building
agreements
subsisted
when notice to
treat was
given.

The legal principle applicable to this case appears to me to have been settled in *Hughes v. Metropolitan R. Co.*, 2 App. Cas. 439, a case something like this, in which persons were held to have so conducted themselves as to have enlarged the time for doing what had agreed to be done by a particular date. I cannot express the principle better than by reading a short passage from the judgment of Lord Cairns. He said (2 App. Cas. 448): "It is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties." That is the general principle, and I think that it is plainly applicable here. In or about 1880 the railway company had begun to advertise their intention to apply for a bill. I am satisfied from the evidence that soon after those advertisements appeared the building operations under these agreements were suspended—they were certainly suspended before the end of 1881, though we cannot make out the exact date. There is a great mass of evidence,

the general short effect of which appears to be that all parties understood that these building operations were to be suspended until the result of the railway scheme was known. In addition to that, the applications made in June, 1882, for rent under the agreement expiring in November, 1881, and the accounts sent in, show conclusively that these agreements were then treated as still subsisting between the parties to them.

The railway company bought the lessor's interest in July, 1883; the conveyance was much later. They entered in January, 1886, and this action was commenced immediately afterwards. Certainly the railway company bought with the clearest possible notice of the rights of the plaintiffs, if any. In fact, the conveyances to them were made very cautiously and clearly, for the agreements were scheduled, which is perhaps a somewhat unusual thing. If they were treated as at an end we should not expect to find them in the schedule, though it does not necessarily follow because they were in the schedule that they had not come to an end. It is perfectly competent for the railway company to contend that although they had notice of the plaintiffs' rights those rights were really determined. Now, what were the railway company's rights under those circumstances? When the notice to treat was given, the building agreements, in my opinion, were not at an end. There had not, it is true, been any agreement to enlarge the time, but there had been such conduct as to preclude the lessors and the railway company claiming under them from treating the agreements as at an end upon the expiration of the term of years mentioned in them. That is in substance what Mr. Justice Kekewich has declared. The whole question in the action has really been, Were these agreements at an end when the railway company entered or were they not? Mr. Justice Kekewich made a declaration that the building agreements were still subsisting, and he also made a declaration that the price or value of the interest of the plaintiff company in the lands and compensation for severance, etc., ought to be assessed upon the footing that the agreements were still subsisting. That is open to an objection in point of form, that it looks like anticipating the function of those who had to decide the value of the land, but in substance I think the declaration that those agreements were subsisting was right, though there is a little ambiguity about it. The ambiguity becomes more apparent when we bear in mind the different periods at which the agreements came to an end according to their tenor. In order to avoid ambiguity it appears to me and my learned brothers that we should be a little more explicit. We propose to strike out the declarations contained in Mr. Justice Kekewich's judgment, and to substitute for them the following declarations: "Declare that on the 16th of September.

1884, when the notice to treat was given, the plaintiffs were entitled as against the defendants to the benefit of three agreements of the 5th of February, 1877, the 5th of April, 1877, and the 27th of October, 1879, for the following periods respectively, viz., as regards the agreement of the 5th of February, 1887, for the portion of the ten years mentioned in the said agreement unexpired on the 16th of September, 1884, and, further, for such extended time as on that day was reasonably necessary to enable the plaintiffs to build the houses to be erected under the said agreement; and as regards the agreement of the 5th of April, 1877, for such extended time as on the 16th of September, 1884, was reasonably necessary to enable the plaintiffs to build the houses to be erected under the said agreement. And declare that at the commencement of this action the plaintiffs were rightfully in occupation under the aforesaid agreements of the lands comprised in the notice to treat, or some part thereof, and that the defendants were not entitled to enter upon and take possession of the lands comprised in the said notice to treat except under the provisions of the Land Clauses Consolidation Act, 1845." The rest of the order will stand as before. It is only right to observe that there appears to have been no discussion before Mr. Justice Kekewich as to the form of the declarations. In substance his order was right, and the appellants must pay the costs of the appeal.

BOWEN, L.J.—I only propose to add some words upon the legal principles to be applied to this case, which, after the discussion we have heard, appear to me to be perfectly clear. We took time to consider, not from any doubt as to what the substance of the judgment in this case should be, for I believe we were all perfectly agreed about it, but because we thought that alterations were necessary in Mr. Justice Kekewich's declarations, and wished carefully to consider what the declarations ought to be.

The first point, which was a double one, made by Mr. Ince and Mr. Clare, was this. They said the plaintiffs are not entitled to an injunction at all, and if they are entitled to an injunction they are not entitled to such a declaration of interest as Mr Justice Kekewich has given them. The appellants urged, in the first place, that a person upon whom a railway company enters ought to go to a jury putting forward at his own risk the title upon which he wishes to rely, and must be left to make good that title afterwards according to the ordinary machinery under the Lands Clauses Act, and that it was not only wrong for him to come to this court for an injunction, but it was also wrong for this court prematurely to declare the interests of the plaintiffs, instead of leaving the plaintiffs to put them forward at their own

peril, and prove them in an action upon the award or verdict.

Is this, then, a case in which the plaintiffs in the first instance were right in coming to the court for an injunction, and if so ought we to make a declaration as to the character of the plaintiff's possession, and to what extent ought the declaration to go? It appears to me that both those questions are answered by considering what is the character of the entry which the railway company here are making. They are not entering under the Lands Clauses Act; they have deliberately abstained from taking the proceedings which would give them a right to make an entry under that statute. In the second place, they are entering upon the land of persons who are in occupation. I will not go through what has been said already upon that subject by Lord Justice Cotton. I have come to the conclusion like my brothers that at the time when the entry was made the plaintiff company were in occupation of the lands in question. The railway company therefore entered upon persons who were in occupation, and who, as will appear from what I say hereafter, were in lawful occupation, and they did not enter under the Lands Clauses Act. They were bound, therefore, to rely on the strength of such right to possession as they possessed paramount to the right of occupation which the plaintiffs were enjoying. Now in such a case the plaintiffs were justified in insisting that until the provisions of the Lands Clauses Act were complied with they were entitled to remain in occupation, and that the railway company had no right to interfere with their occupation. This was, therefore, a case in which relief might properly be asked at the hands of a court of equity. But that does not dispose of the entire difficulty which Mr. Ince and Mr. Clare put forward, because they said that, even if that were so, the court ought not to make a declaration as to what the exact character of the plaintiffs' interest was, but ought to leave that to be decided after the jury had given their verdict. The answer to that contention appears to me to be that inasmuch as the railway company could only lawfully enter by virtue of such right of possession as they had paramount to the rights of occupation of the plaintiffs, the railway company's defence could only be sustained by showing that they had some such paramount interest, and inasmuch as they took with notice of the title of the plaintiffs as against Boulton, such paramount interest could only exist upon the ground that the title of the plaintiff company under the agreements had come to an end. That is the only answer the railway company could have to the action, and whether the agreements had been so extended that the plaintiff company still had an interest under them was the plain issue raised in the case. It ought not to be supposed that

**Injunction
against pro-
ceedings.**

in making the declaration which we do we are in any way intentionally departing from the ordinary course which is pursued in these cases. The declaration is made not in order to assist the jury, but in order to determine the sole issue in the case. The railway company, if they wished to avoid this declaration, ought to have done their best to put an end to the action, and the proper course for them to pursue, if they had entered on the land without complying with the provisions of the Lands Clauses Act, was to comply with the provisions of the Land Clauses Act after action brought, and then to take out a summons to stay the action upon payment of costs, because there would be nothing further to decide. As long as they abstained from doing that the plaintiffs were driven to go down to trial in order to decide the issue which was raised, which is the issue we have decided. So much for Mr. Ince and Mr. Clare's first point, a point urged with the greatest ingenuity, especially by Mr. Clare.

The next point is a simple one, perfectly simple as regards the principle of law and equity to be applied. As Lord Cairns put it in the passage which has been read (and Title of plaintiffs to lands. which I read again simply because I desire to add one word of answer to the argument which was addressed to us by Mr. Clare) in *Hughes v. Metropolitan R. Co.*, 2 App. Cas. 439, 448: "If parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties." Now, it was suggested by Mr. Clare that that proposition only applied to cases where penal rights in the nature of forfeiture, or analogous to those of forfeiture, were sought to be enforced. I entirely fail to see any such possible distinction. The principle has nothing to do with forfeiture. It is a principle which lies outside forfeiture, and everything connected with forfeiture, as will be seen in a moment by reflection. It was applied in *Hughes v. Metropolitan R. Co.* in a case in which equity could not relieve against forfeiture upon the mere ground that it was a forfeiture, but could interfere only because there had been something in the nature of acquiescence, or negotiations between the parties, which made it inequitable to allow the forfeiture to be enforced. The truth is that the proposition is wider than cases of forfeiture. It seems to me to amount to this, that if persons who have contractual rights against others induce by their conduct those against whom they have such

rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before. That is the principle to be applied. I will not say it is not a principle that was recognized by courts of law as well as of equity. It is not necessary to consider how far it was always a principle of common law. Applying that principle to the facts here, I think nobody can come to any but one conclusion, viz., that Mr. Boulton (and the railway company took subject to his liabilities) had induced the plaintiff company reasonably to believe that time would not run against them as regards the building agreements, and that he would not enforce his rights as regards time for building, until a reasonable period had elapsed after they should have received notice from him. As soon as the railway company served notice to treat the reasonable time it seems to me necessarily began to run. It is true, as Mr. Ince and Mr. Clare said, that no fresh agreement was made as to what should be done with regard to these lands, but that does not prevent the equity arising as regards the running of the time, though, of course, it makes the extension of the time less valuable, because, to a certain extent, the plaintiffs would remain at Mr. Boulton's mercy as to the limits of the extension. As soon as we find that the plaintiffs were in lawful occupation under these agreements, the rest of our judgment seems to me necessarily to follow.

KEOKUK AND NORTHWESTERN R. CO.

v.

DONNELL *et al.*

(Iowa Supreme Court, May 8, 1889.)

Eminent Domain—Injunction against Condemnation Proceedings—Defence Available at Law.—A railroad company cannot enjoin *ad quod damnum* proceedings on the ground that the land-owner conveyed the land in question to another company whose right plaintiff acquired from the purchaser at a sale in proceedings to foreclose a mechanic's lien, that the damages had been paid to defendant, and that his claim for damages is barred by the statute of limitations, these defences being available at law in the *ad quod damnum* proceedings.

Same—Estoppel—Recognition of Company's Title.—The defence that the land-owner has by his acts recognized the company's title to the lands in question, and is thereby estopped from instituting *ad quod damnum* proceedings, may be pleaded in such proceedings, and does not form any ground for a suit in equity by the company to enjoin the land-owner from prosecuting such proceedings.

APPEAL from District Court, Lee County.

Action by the Keokuk & Northwestern R. Co. to enjoin the defendants from prosecuting *ad quod damnum* proceedings to recover the value of certain land occupied by plaintiff's railroad. Plaintiff appeals from a decree upon the merits declaring it had no right, title, easement, or right of way upon the land involved in the action, and that the defendant Donnell was the owner thereof in fee simple.

D. F. Miller, Sr., and *P. Trimble* for appellant.

Anderson & Davis for appellees.

BECK, J.—1. The defendant W. A. Donnell instituted *ad quod damnum* proceedings to recover damages for the occupation of the right of way by plaintiff's railroad of certain lands owned by him. A jury was impanelled by the sheriff to assess defendant's damages in the manner prescribed by the statute. Thereupon plaintiff brought this action to enjoin and restrain the *ad quod damnum* proceedings, on the ground that they are wrongful and unauthorized by law, and, if judgment be had thereon, it would be a cloud upon plaintiff's title to the right of way, and it has no adequate remedy at law. Plaintiff bases its claim to the right of way over defendant's lands, or the right to occupy them for the purposes of its railroad, upon the following facts: "In 1869 defendant Donnell and his wife united in a deed to the Keokuk & Minnesota R. Co., conveying a part of the land in question in this suit for the right of way of a railroad to be built by that company. A writing upon the face of the deed declares that it is not to be called for until the road is built and running through the land.' All the right of this railroad company to the lands was sold to a trustee under a judgment obtained on a proceeding to foreclosure a mechanic's lien, and the trustee afterwards conveyed the right of way to plaintiff, which in 1880 entered upon the land, and with the knowledge and consent of defendant Donnell, and constructed its railroad. It is alleged in the petition that plaintiff paid defendant the damages assessed by arbitrators for the occupation of this part of the lands by the railroad. In an amended petition it is alleged that, as plaintiff's *ad quod damnum* proceeding was not commenced within five years after the lands were first occupied, they are barred by the statute of limitations; and

it is further alleged in this pleading that plaintiff caused the right of way held by the other railroad company to be condemned, and under such proceedings acquired it. It is also alleged that the enforcement of any agreement to pay defendant damages on account of the occupation of the lands by the railway company is barred by the statute of limitations. Defendants, in an amended answer, allege that the right of way which plaintiff claims to have acquired under the other company was by it abandoned, and it retained no rights thereto. It is shown by defendant's answer that, in the proceedings sought to be enjoined in this case, defendant's damages for the occupation of his lands by the railroad were assessed at the sum of \$2234, and plaintiff appealed from such assessment to the district court. Defendants also allege in their answer that there is no equity in plaintiff's petition. An amended abstract filed by appellee, which is not denied, and must therefore be taken as admitted, shows that the defendants were not parties to the proceeding to enforce a mechanic's lien, under which plaintiff claims to have acquired the right of way.

2. In our opinion, plaintiff has a plain, complete, and adequate remedy at law against the threatened assessment of damages, if it be illegal or unauthorized by law for any of the causes and reasons set up and alleged in its petition. If defendant conveyed the right of way to the other railroad company, and the plaintiff by the mechanic's lien proceedings acquired that right of way, which had not been abandoned, but conferred the right upon plaintiff to the occupancy of the land, these matters could have been pleaded and established as a defence to the *ad quod damnum* proceedings commenced by defendant. They present simple questions of title to the right of way,—plaintiff claiming that it owns the right of way; defendants insisting that they have never parted with that right. Issues involving these facts and defences, if established in plaintiff's favor, would defeat defendants' *ad quod damnum* proceeding. All question as to the effect of the judgment in the mechanic's lien proceedings, and in fact all other questions involved in the issue as to the ownership of the right of way, could be properly considered and determined in the *ad quod damnum* proceedings. The same remarks may be made as to the questions involving the abandonment of the right of way, the statute of limitations, and, indeed, as to all questions which pertain to the ownership of the right of way or rights to the occupancy thereof. See 1 High, Inj. (2d Ed.) §§ 629-644; Mills, Em. Dom. §§ 160, 161; Central Iowa R. Co. v. Moulton & A. R. Co., 57 Iowa, 249, 10 Am. & Eng. R. Cas. 138.

3. Plaintiff insists that defendants are estopped to deny its

right to the occupancy of the right of way. But the doctrine and rules of estoppel are not alone recognized and enforced in a case in chancery. They may be pleaded and established to support actions at law or defences thereto. If defendant entered into any contract, received any sum as damages, or did any act recognizing plaintiff's right to the occupancy of the land, these matters may be shown in the *ad quod damnum* proceedings to defeat him of recovery. An action at law may be defeated by showing that plaintiff has recognized by his acts or admitted by his declarations that his own claim is not well founded, or that defendant is in fact the owner of the property involved in the suit which plaintiff seeks to recover. That is just this case. Defendant claims in the *ad quod damnum* proceeding to recover the value of the land occupied by the right of way. Plaintiff insists that it is the owner of the right of way, and that defendant has in law, by his acts and declarations, admitted its ownership. The issues thus formed may be tried at law in the *ad quod damnum* proceedings. Plaintiff, therefore, has a plain, adequate, and certain remedy in that action. If all the issues which are decisive of the case are triable in the *ad quod damnum* proceedings, plaintiff has a plain, adequate, and complete remedy in the courts of law, and must pursue it, instead of appealing for relief to the court of chancery. The issues involved in the cause of action of plaintiff, and the defences thereto, being cognizable at law, ought to be tried according to the rules and practice prevailing in the law courts. These familiar elementary doctrines do not demand in their support the citation of authorities.

Estoppel to deny right to occupy right of way.

From these considerations it appears that the district court, sitting in equity, had no jurisdiction of this case. This objection was raised by the allegations of the answers, to the effect that there was no equity in plaintiff's petition. But in the absence of any pleading raising the objection based upon the want of jurisdiction by reason of the fact that there is a plain, adequate, and complete remedy at law, or the absence of objection in any form based upon this fact, this court will itself, *sua sponte*, raise the objection. Story, Eq. Pl. § 481.

The petition of plaintiff will be dismissed. But as the decision is not based upon the merits of the case, and the rights of the parties are in no way determined by this decision, it will not affect the right of plaintiff to resist at law the claim of defendants to compensation for the appropriation of their lands for the uses of plaintiff's railroad. Decrees in chancery and judgments at law only estop the parties thereto, when based upon the consideration of the merits of the case. The dismissal of a case because the court in which it is pending has not jurisdiction thereof cannot defeat recovery upon the same cause of action,

when a suit is brought in a forum possessing jurisdiction to try it. We will not be expected to cite books to support this elementary doctrine. The decree of the court below, in effect, cuts off all right of the plaintiff to resist defendants' claim to damages. It was probably based upon the merits of the case, which are not determined by us. The decree dismissing plaintiff's petition, which will be entered in this court, will be without prejudice to plaintiff to make defence to the *ad quod damnum* proceedings instituted by defendants. Affirmed.

Construction—Estoppel of Land-owner from Asserting Claim to Lands.—

By consenting to the erection of structures upon land for use in the operation of a railroad, the land-owner does not thereby estop himself and his grantees, after the company has abandoned the land, from asserting right and title when the company proposes again to appropriate, not only the particular parcels formerly occupied, but also additional lands. *Lake Erie & N. W. R. Co. v. Michener*, Ind. Sup. Ct., Feb. 16, 1889.

HOFFEDITZ

v.

SOUTHERN PENNSYLVANIA R. AND MINING CO.

(*Pennsylvania Supreme Court, June 24, 1889.*)

Release—Existing Claims—Damages for Insufficiency of Culvert.—A release and discharge granted by plaintiff in favor of a railroad company, "of, and from all suits, claims, demands, and damages whatever, for, upon, or by reason of their entry upon and taking and occupying" certain lands, "and the location and construction thereon of said railroad and works connected therewith," is a bar to an action for damages caused by the insufficiency of a culvert constructed prior to the granting of the release.

ERROR to Court of Common Pleas, Franklin County.

Action by A. H. Hoffeditz against the Southern Pennsylvania R. & Mining Co. for damages caused to plaintiff's land by the insufficiency of a culvert. The jury returned a verdict for the defendant, and the following point was reserved: "If the railroad, with culvert and embankments, as now maintained, was constructed upon and over the plaintiff's land at the time of the execution and delivery of the release of damages executed by Mrs. Louisa Hoffeditz and others, including the plaintiff, dated January, 1871, and offered in evidence, the said release is a bar to the plaintiff's right of action, and the verdict must be for the defendant."

The opinion of the court upon the point reserved was in the following terms: "The plaintiff is lessee of Louisa Hoffeditz, the owner of the fee. The defendant is the successor and assign of the Southern Pennsylvania Iron & R. Co. In 1870-71, this last named company located and built a railroad from the Cumberland Valley R. to Loudon and Richmond, with a branch to Mercersburg. The junction is at the Hoffeditz farm, and forms a V. It was here that, before the coming of the railroad, the surface water from above, after heavy rains, collected into a ditch or natural channel, escaped into the creek a few rods below. Where the Loudon branch crossed this ditch the railroad company raised and graded a high embankment, and in it put a culvert for the purpose of discharging the water which otherwise would accumulate in the V. The plaintiff contended that the culvert was not sufficient to discharge the water collected in the V in heavy rains, and that in consequence his land at the junction was flooded at such times, and rendered spouty, and his growing crops damaged. The jury found for the plaintiff. But on the trial the defendant put in evidence a release of Louisa Hoffeditz to the Southern Pennsylvania Iron & R. Co., dated January —, 1871, acknowledged 27th March, 1871, reciting the location of the railroad through her land, taking $6\frac{1}{4}$ acres; and she then, in consideration of the advantages to accrue, and the sum of \$1000, and an agreement on the part of the company to build a switch and siding on the land, 'remised, released, quit claimed, and forever discharged the Southern Pennsylvania Iron & R. Co., their successors and assigns, of and from all suits, claims, demands, and damages whatever for, upon, or by reason of their entry upon and taking and occupying the above-described narrow pieces or strips of land, and the location and construction thereon of the said railroad, and works connected therewith.' There was this admission by plaintiff: 'For the purpose of reserving a point, the fact that the culvert and embankment on the plaintiff's land, as now maintained, was constructed and completed before the date and delivery of the release offered in evidence, is admitted.' The defendant's sixth point was as follows: 'If the railroad, with culverts and embankments, as now maintained, was constructed upon and over the plaintiff's land, at the time of the execution and delivery of the release of damages executed by Mrs. Louisa Hoffeditz and others, including the plaintiff, dated January, 1871, and offered in evidence, the said release is a bar to the plaintiff's right of action, and the verdict must be for the defendant.' This point was reserved. The question has been argued. The lease to the plaintiff was subsequent to the release of the company. Mr. Stewart contends that the release is a bar to the plaintiff's action, because the embankment was raised and graded,

and the culvert finished before the release was executed. What the railroad company proposed to do in respect of the carrying off the water brought down by the drain was to be seen by all. The plaintiff's lessor had better means of knowing whether the culvert would prove sufficient than the company's engineers, she having experience of the rains in that region, and the volume of water sent down by the watershed, and collected thereat; and *non constat* that the consideration she received for the release was not based in part on the probable damage to land and crops in the V by reason of the damming back of the water. He cites *McCarty v. St. Paul, M. & M. R. Co.*, 14 Am. & Eng. R. Cas. 297. Mr. Brewer contends that the release had no reference to the culvert or its capacity, Mrs. Hoffeditz having a right to suppose that the railroad company had constructed a culvert of sufficient width and capacity to vent all the water seeking through it a way to the creek; that she released all damages by reason of entry on land and location, and construction of the road and works connected therewith, but not damages to arise from the unskilful construction of the road and works by the company, from negligence or want of ordinary engineering knowledge and skill. In other words, that the company having put in a culvert, and being in duty bound to put in a sufficient one, must be held to have undertaken for that, in dealing with one unskilled and ignorant in such matters. He cites *Pittsburgh, Ft. W. & C. R. Co. v. Gilleland*, 56 Pa. St. 445. I hold with the defendant, thinking his contention founded on the better reason, and best supported by authority. Therefore let judgment be entered for the defendant *non obstante veredicto*."

Plaintiff sued out a writ of error.

O. C. Bowers and *W. U. Brewer*, for plaintiff in error.

W. Rush Gillan and *Rowe & Stewart* for defendant in error.

PER CURIAM.—It was not error to enter judgment for the defendant *non obstante veredicto* upon the reserved point. The release was broad in its terms. After reciting the consideration, \$1000, and certain acts to be performed by the defendant company, it "remised, released, quit-claimed, and forever discharged the Southern Pennsylvania Iron & R. Co., their successors and assigns, of, and from all suits, claims, demands, and damages whatever, for, upon, or by reason of their entry upon and taking and occupying the above-described narrow pieces or strips or land, and the location and construction thereon of the said railroad and works connected therewith." In connection with this release there was the fact, admitted upon the trial, and incorporated with the point reserved, "that the culvert and embankment on the plaintiff's

Effect of
release.

land, as now maintained, was constructed and completed before the date and delivery of the release offered in evidence." In the face of these facts we are unable to see any ground upon which the plaintiff rests the claim for damages. There must be some color of right to sustain a suit even against a railroad company. There is none in this case.

Judgment affirmed.

Effect of Conveyance of Land for Right of Way as Release of Claim.—In *Radke v. Minneapolis & St. L. R. Co.*, Minn. Sup. Ct., July 29, 1889, the court held, following *McCarty v. St. Paul, M. & M. R. Co.*, 31 Minn. 278, 14 Am. & Eng. R. Cas. 297, that, from a conveyance to a railroad company of the land upon which its road had been previously constructed, the grantor is to be presumed to have consented to the maintenance of the road, although his adjacent lands might be injured thereby. It appeared that the plaintiff had, for a valuable consideration, conveyed to the defendant in fee, by deed with the usual covenants, a strip of land one hundred feet wide, which was described as "fifty feet in width on each side of the centre line of the Minneapolis & St. Louis R., where the same is now located. It was held that plaintiff could not claim damages for negligence in the construction of the road in that the defendant had not put in such a culvert as was necessary to carry the water in the direction in which it had been accustomed to flow. The court said: "This case cannot be distinguished from that of *McCarty v. St. Paul, M. & M. R. Co.*, 31 Minn. 278, 14 Am. & Eng. R. Cas. 297. An examination of the record upon which that decision was made discloses no difference between that case and this, except that in the former case the deed not only conveyed the land upon which the railroad had been already constructed, but it contained an acknowledgment of satisfaction, through the consideration named in the deed, for all damages that had accrued by reason of such construction. This satisfaction for merely past damages could have had no effect to bar a subsequent recovery for the further continuance of a private nuisance, nor could it be effectual as a license to continue to maintain the embankment without sufficient culverts. It was of no importance that such acknowledgment was incorporated in a deed. The decision must be deemed to rest upon the ground that from the sale and unqualified conveyance to the railroad company of the premises upon which its road and embankment had already been permanently constructed, and where it was to be expected to remain, it was to be presumed that the grantor consented to the continued existence of such permanent improvements, for the enjoyment and use of which the purchase and conveyance of the land was obviously made."

Damages Included in Consideration of Conveyances of Right of Way.—See *St. Louis, I. M. & S. R. Co. v. Walbrink* (Ark.), 26 Am. & Eng. R. Cas. 604, note, 607; *McCarty v. St. Paul, M. & M. R. Co.* (Minn.), 14 Ib. 279; *St. Louis, I. M. & S. R. Co. v. Morris* (Ark.), 5 Ib. 48; *Republican Val. R. Co. v. Fellers*, (Neb.) 20 Ib. 256.

88 A. & E. R. Cas.—42

ATCHISON, TOPEKA AND SANTA FE R. CO.

v.

MORGAN.

(Kansas Supreme Court, June 7, 1889.)

Fixtures—What Are—Criterion—Intended Use.—Whether a structure is a fixture or not depends on the nature and character of the act by which it is put in its place, and the purpose for which it is intended to be used.

Same—Physical Annexation.—In determining what is a fixture, the simple criterion of physical annexation is so limited in its range and so productive of contradiction that it will not apply with much force.

Same—Use to Which Fixture Is Put.—One of the tests of whether personal property retains its character or becomes a fixture is the uses to which it is put. If it is placed on the realty to improve it and make it more valuable, it is some evidence that it is a fixture; but, if it is placed there for a use that does not enhance the value of the realty, this is some evidence that it is personal property.

Same—Pump and Boiler for Filling Railroad Tank.—Where a railroad company dug a well, and put in a pump and a boiler for the purpose of filling its tank on the line of its railroad, and used the same for several years, believing the well and attachments were upon its own land, when it is discovered that they are on another's land, the company can remove the pump and boiler without paying the owner of the land therefor.

ERROR from District Court, Osage County.

This was an action brought by defendant in error in the district court of Osage county, Kan., against the plaintiff in error, to recover the sum of \$500 for an alleged trespass, and to enjoin further trespasses threatened by plaintiff in error upon the same real estate, which trespass would permanently injure the said real estate. Defendant below filed a general denial. At the April term, 1887, the case was heard by the court, a jury being waived, upon the following agreed statement of facts:

"It is hereby agreed by and between the parties hereto, that this cause shall be heard upon the following agreed statement of facts: That on and prior to September, 1880, one A. O. Morgan was the owner of the following described real estate in Osage county, Kan., to wit: Bounded by a line commencing at a point fifty feet south and one hundred feet east of the southeast corner of block number thirteen, in the town (now city) of Burlingame, in said county and state, as platted and recorded in the office of the register of deeds of said county; thence running

east one hundred and twenty-five feet; thence south one hundred and fifty-five and one-half feet; thence west one hundred and twenty-five feet; thence north to the place of beginning. Also a strip of land adjoining and immediately south of the above-described land, running fifty feet north and south; one hundred and thirty-six feet east and west,—the west boundary of the last piece being a continuation of the west boundary of the first-described real estate; the west boundary of each of said pieces being the right of way, at the time, of defendant, and ever since belonging, used, and occupied by the defendant as and for its right of way. The first described piece is designated by agreement as 'A,' and the second described piece as 'B,' for the purpose of reference. At about September, 1880, the defendant purchased from the said A. O. Morgan the said piece of land designated as 'B,' and received from him a good and sufficient conveyance therefor. That immediately thereafterwards the defendant, intending to erect a well and pump and boiler-house upon the land so purchased by it, and designated as 'B,' commenced the work of digging such well and building such house and so forth, on what it in good faith believed to be the land so purchased by it, and designated as 'B,' but that as a matter of fact it built its boiler-house upon the ground designated as 'A,' and in digging its well dug it of the following dimensions: Twenty feet in diameter, and eighty feet deep, but walled up about twenty-four feet. That the well, when so dug, was as a matter of fact located and situated so that two feet of it only were upon the land belonging to the defendant, and designated as 'B,' and the balance of it upon the land designated as 'A.' That after the building of said house on land A, the boiler was put in there for the purpose of operating a pump in said well, and a pump was also placed in said well, to be operated by steam furnished by said boiler. The pump and boiler were all actually located upon land A. The defendant dug this well for the purpose of obtaining water to be used in a tank situated on its right of way, to supply its engines running on its right of way. Afterwards, and about 1882, the said A. O. Morgan disposed of and conveyed land A to third parties, who subsequently and soon afterwards conveyed the same to the present plaintiff, who since that time has been and is now the owner thereof, and has been continuously in the possession of the land since he owned it, save and except the boiler and pump, which were used by defendant and in its possession, except as hereinafter stated. About June, 1886, the plaintiff having ascertained that said well was located mostly upon his premises, and that said boiler-house and boiler were also upon his premises, inclosed the same with a fence, and forbade the defendant from entering upon his premises for the purpose of using either said pump or boiler. That

this was the first time defendant was ever notified by any owner of said property not to use the same, and the first time it knew it was on plaintiff's property, except as shown by the statement hereinafter made. That from that time until about September the plaintiff kept the defendant from using the same, and that about September, 1886, the defendant commenced proceedings for the purpose of having the land on which said boiler, pump, and well were situated, condemned, and had commissioners appointed, who made a view and report assessing plaintiff's damages under such condemnation proceedings at six hundred dollars. That the defendant, deeming said assessment too high, refused to accept the same, and abandoned said proceedings, and has never done anything further to acquire any right under said proceedings and claims none by virtue thereof. That thereafterwards, against the will and consent of plaintiff, and in the nighttime, the defendant forcibly took and removed said boiler from said premises on which they were located as above described, and that in doing so they so damaged the boiler-house that it has since blown down, and broke through the fence built by the plaintiff. That the plaintiff having commenced this action, and obtained a temporary order of injunction, the pump has not been removed owing to said injunction, and remains where it was originally placed. That the value of the boiler at the time it was taken by defendant was the sum of one hundred dollars.

That the value of the pump as it remains in the well is the sum of one hundred dollars. That the boiler is connected with the pump by a steam-pipe for the purpose of furnishing steam from the boiler to operate the pump with and for conveying and carrying water to the tank. That the boiler was placed upon the ground upon a cast-iron base, which held the ash-pan, and that it was not set in masonry. That the damages occasioned by the trespass, outside of the taking and carrying away of the boiler and injury to the building, is and was the sum of twenty-five dollars, and the injury to the building was the sum of twenty-five dollars. That at the time the well was being dug the then owner of the property, A. O. Morgan, stated to the workmen that he believed they were too far north to be on their own land. That at and prior to the time of the commencement of the suit the defendant was intending to remove the pump off from the land designated as 'A,' and intended to fill up the well, and threatened to do these things, each of which the plaintiff forbade the defendant from doing at the time. That at the time of the commencement of this suit the defendant had no interest in land A, except as herein stated; and that plaintiff had no interest in land B, except as herein stated. That the well on land A was for the purpose of obtaining water, and the pump was connected with pipes with the water in the well, and was adapted

to drawing water from the well, and used for that purpose, and that purpose only; and the motive power to work the pump was the boiler connected with the pump by pipes, and without the boiler the pump could not be worked, as the pump had a steam-cylinder, and could not be worked by hand-power, and the defendant severed the boiler from the pipes connecting the boiler with the pump, and removed the said boiler from the freehold."

Upon the agreed statement of facts the court found as conclusions of law: "(1) That defendant had no right to remove the boiler at the time when it did remove the same. (2) That the defendant has no right to remove the pump. (3) That the plaintiff is entitled to recover the value of the boiler. (4) That, as between the parties hereto, the pump is the property of the plaintiff. (5) That the defendant was a trespasser in its use of the boiler and pump. (6) That the plaintiff is entitled to recover for the injury to the boiler-house. (7) That the plaintiff is entitled to recover from the defendant the sum of \$150, as follows: For value of boiler, \$100; for damages by removal of boiler, \$25; for damages to boiler-house, \$25; total, \$150.

A judgment was rendered in conformity to the conclusions of law. Complaining of the judgment, the defendant brings the case here, and asks for a review and judgment in its favor on the agreed statement of facts.

Geo. R. Peck, A. A. Hurd and C. N. Sterry for plaintiff in error.
Wm. Thompson for defendant in error.

HOLT, C.—The plaintiff in error, defendant below, complains of two errors in the trial of the action: One, allowing damages for the boiler and its removal; the other, in decreeing a perpetual injunction against the removal of the pump. Both of the alleged errors involve the application of the same principles, and require the determination of the same question, namely, whether the several pieces of property retained their character as chattels or became fixtures. What we may say of one thing in this connection will usually apply to all the others.

It will be conceded that before plaintiff could recover for the conversion of the boiler it must have become a part of his real estate. The boiler originally was the property of defendant, and it could have done with it as it pleased, and the only way it could have become divested of its ownership, under the facts in this case, was in the manner of placing it on plaintiff's land. If it then became a fixture, it was the property of plaintiff.

Hill gives this definition of "fixtures:" "By the term 'fixtures' are designated those articles which were chattels, but which, by being physically annexed or fixed to the real estate, become a part of and accessory to the freehold." It is frequently a difficult and vexatious question to ascertain the dividing line between real and personal property, and

What are fixtures.

to decide upon which side of the line certain property belongs. When we compare a thing at the extremity of one class with a thing at the extremity of the other, the difference is obvious, but when we approach the question of fixtures, which is the dividing line between real and personal property, there is often great difficulty. The decisions of the courts are apparently as diverse as the peculiarities of the facts in the different cases that are decided, and, being largely governed by the particular facts of each case, the citation and examination of decisions often tend to confuse, rather than to enlighten, the judgment. In the statement of facts it is agreed that the boiler was placed on the ground upon a cast-iron base, was not set in masonry, and was connected with the pump by a steam-pipe for the purpose of furnishing steam from the boiler to operate the pump, and thereby carry water to the tank. This of itself does not necessarily show such a physical attachment to the realty as constituted a fixture. *Hendy v. Dinkerhoff*, 57 Cal. 3; *Towne v. Fiske*, 127 Mass. 125; *Kimball v. Grand Lodge, etc.*, 131 Mass. 59; *Balliett v. Humphreys*, 78 Ind. 388; *Hoyle v. Plattsburgh & M. R. Co.*, 51 Barb. N. Y. 45.

But attachment to the realty is not alone sufficient to change the character of personal property. It is only one of several tests to determine whether property originally a chattel has become a fixture by being used for a particular purpose, and however the rule may have been formerly, it is not now deemed to be the controlling test. Tyler, on page 101 of his *Treatise on Fixtures*, says: "The simple criterion of physical annexation is so limited in its range, and so productive of contradiction, that it will not apply with much force, except in respect to fixtures in dwellings." In *Meigs' Appeal*, 62 Pa. St. 28, it is said: "In determining what is a 'fixture,' the notion of physical attachment is exploded. It is now determined by the character of the act by which the structure is put into its place, the policy of the law connected with its purpose, and the intention of those concerned." This Pennsylvania case lays down the rule more broadly, perhaps, than that of some other courts, yet it shows the tendency of modern decisions. See also *Ewell*, *Fixt.* 20, 293. There is scarcely any kind of machinery, however complex in its character, or no matter how firmly held in its place, which may not with care be taken from its fastenings, and moved without any serious injury to the structure where it may have been operated, and to which it may have been attached. That the simple fact of annexation to the realty is not the sole and controlling test, of whether a certain article is a fixture or not, is very well illustrated by the fact that trees growing in a nursery, and kept there for sale, are personal property, while trees no larger, if transplanted to an

Physical
annexation.

orchard, become real estate. On the other hand, many things although not attached to the real property by their use,—keys to a house, to the windows, fences and fence-rails, etc.

It can readily be seen that one of the tests of whether a chattel retains its character or becomes a fixture is the use to which it is put. If it be placed on the land for the purpose of improving it and to make it more valuable, it is evidence that it is a fixture. Applying this test to the facts of the case, we are led to inquire whether this benefit was intended. The real estate upon which this benefit was conferred was a narrow strip in the city of Burlingame, and it was intended that this well, boiler, and the attached boiler-house greatly benefited this small tract of land. It was there for the purpose of enhancing its value, and it would not enhance the value of such property if it were removed. A piece of ground, by digging a well thereon, is improved; and the only value added thereto is the value of the boiler, and boiler-house like those in connection with the well, they were worth as chattels. The test of whether a chattel becomes a fixture by the act of annexation has been applied by the courts, to determine whether the chattel is a fixture or not. 11 Alb. Law J. 151; *Co. v. Hawley*, 44 Iowa, 57; *Taylor v. Huebschmann*, 29 Wis. 655; *Paul Co.*, note, 2 Wall. (U. S.) 645; *North Canton Co.*, 30 Md. 347; *Wagner v. Cleveland*, Ohio St. 563. It has been held that, before a chattel can become a fixture by actual physical annexation, the intention of the parties and the uses for which it is to be put, must all combine to change the character of the chattel to that of the fixture. *Teaford v. Ewell*, 511; *Ewell*, Fixt. 293; *Ottumwa Woolen Co. v. Ottumwa*, *supra*.

In this connection it is well enough to say that the circumstances under which this boiler was placed were such as to make the plaintiff a trespasser. It is conceded that the railroad was a trespasser, yet it was not a wilful trespasser. The well, put in the pump and boiler, and the boiler-house, under the belief it was occupying the land, and only discovered its mistake after it had been in occupation. There is nothing to show that the plaintiff was anything by digging the well where it was located on its own land. In fact, it is stated that two other wells were on its own land. It can be safely presumed that the plaintiff was as good a one if it had been placed on its own land.

the division line instead of plaintiff's. It dug the well, put in the pump and boiler, for the sole purpose of operating its railroad, and not to improve the land where the property was placed. The company began condemnation proceedings to obtain the land, but did not follow them to a conclusion. If it had, it would have been compelled to only pay for the land, and not for its own improvements thereon. This rule is well established by authority. *Cohen v. St. Louis, Ft. S. & W. R. Co.*, 34 Kan. 158, 22 Am. & Eng. R. Cas. 116; *Justice v. Misquehoning Val. R. Co.*, 87 Pa. St. 28; *Daniels v. C., I. & N. R. Co.*, 41 Iowa, 52; *Lyon v. Green Bay & M. R. Co.*, 42 Wis. 538; *Greve v. First Div. St. Paul & P. R. Co.*, 26 Minn. 66; *Wagner v. Cleveland & T. R. Co.*, *supra*; *Schroeder v. DeGraff*, 28 Minn. 299.

While it is the general rule in regard to annexation made by a stranger with his own materials on the soil of another, without his consent, that the owner of the materials loses his property because he is presumed to have parted with it, and dedicated it to the owner of the land, yet the peculiar circumstances under which this well was dug would indicate there should be a modification in this instance. *Lowenberg v. Bernd*, 47 Mo. 297. If he had placed it there, even under a mistake, for the purpose of ultimately improving the real estate, the law might under this state of facts have held it to have been the property of the owner of the real estate, but under the agreed statement it was placed there solely for the purpose of better operating its own railroad. If it had been placed on its own right of way, and that afterwards abandoned, then, under a respectable list of authorities, it would have been permitted to have taken away the pump, boiler, and boiler-house. We can see no reason for a distinction that would have allowed any compensation to plaintiff if condemnation proceedings had been instituted, after occupation and placing improvements upon the land, and prosecuted to a conclusion, and an action brought in the way this one was. In one case the authorities are an almost unbroken current that the railroad could not have been compelled to have paid for its own property placed upon the land. We also think they should not be required to do so now. We believe in this action, because the improvements did not and were not intended to benefit the realty, that the pump, boiler, and building should be held to be personal property, and not fixtures. We are well aware that very many authorities hold that the buckets in a well are real property. Unquestionably, between vendor and vendee and mortgagor and mortgagee this is the rule; but under the facts in this case, considering the use to which these articles were put and the relations of the parties, we are constrained to believe that rule does not apply. For the reasons given above we re-

commend that the judgment awarding damages against the defendant be reversed, and the injunction so granted be modified as to allow the defendant to remove the pump.

PER CURIAM.—It is so ordered; all the justices concurring.

GEORGIA PACIFIC R. CO.

v.

WILKS.

(Alabama Supreme Court, April 11, 1889.)

Lands—Power to Acquire Lands in Aid of Construction—Repeal of Statute.—The power of a railroad company incorporated under the Alabama act of Dec. 29, 1868, to "acquire by purchase or gift any lands in the vicinity of said road or through which the same may pass, so far as may be deemed necessary by said company to secure the right of way or such as may be granted to aid in the construction of said road," was not abrogated by the repeal of part of that act, by the act of March 8, 1876, in so far as concerns corporations which had obtained charters under the statute of 1868 before its repeal.

Same—Consolidated Company—Power to Hold Lands.—Under the provision of Alabama Code 1868, § 1583, that consolidated railroad companies "shall possess all the rights, powers, and franchises conferred upon said two or three corporations," the power of the consolidated company to acquire and hold lands granted in aid of the construction of the road under the Alabama act of Dec. 29, 1886, which authorizes companies organized under it to acquire by purchase or gift lands convenient or necessary for the right of way of the company, "or such as may be granted to aid in the construction of said road," only exists when the lines of the consolidating companies bear such relation to each other, or the contemplated general enterprise, that their chartered routes could be utilized in whole or in part in the construction of a continuous line over which cars could run without break or interruption.

APPEAL from Chancery Court, Fayette County.

Bill in equity by the Georgia Pacific R. Co., a corporation organized under the laws of Alabama, against M. D. Wilks and wife for the specific performance of a contract under seal, by which the defendants bound themselves to convey to one Colquit and his associates the coal and iron in certain lands, with power to mine the same, and the right of way for roads and railroads. The bill alleged that the contract was assigned by Colquit and his associates to the Richmond & Danville Extension Co., and by that company to complainant; that the terms of the contract had been fulfilled, but that the defendants refused

to execute a conveyance in pursuance of the agreement intended for execution. A demurrer by the defendant to the bill having been overruled by the chancellor, the decree of the latter was reversed on appeal. See 79 Ala. 180. The bill was amended by striking out the name of Mrs. Wilks as a party defendant, and an allegation was added that "said written agreement was acquired by your orator as property taken for subscription to the capital stock of said Georgia Pacific R. Co. by said R. & D. Extension Co." The defendant again demurred to the bill and the demurrer was sustained, but the chancellor allowed the complainants to further amend the bill. The bill was then amended by setting out the proceedings by which the Georgia Pacific R. Co. was incorporated, and the charters of the several railroad companies which were consolidated with it. On demurrer the chancellor dismissed the bill "because it fails to show that the complainant has any right to acquire the mineral lands claimed." The decree also declared that "as the bill shows that the complainant was incorporated under the general laws contained in the Code, no further amendment can be made so as to show its capacity to hold the said lands." The complainant appealed.

McGuire & Collier and *James Weatherly* for appellant.

Nesmith & Sanford and *E. A. Powell* for appellee.

STONE, C.J.—The Georgia Pacific R. Co. is a consolidation of five other railroad corporations, two of which had been partially constructed, while the remaining three are not shown to have been commenced. The Greenville, Columbus & Birmingham R. Co. was incorporated in the state of Mississippi. Its bearing was eastward. It had made some progress towards construction. The Columbus, Fayette & Decatur R. Co. had its bearing north-eastward. This was an Alabama corporation. These two companies consolidated, merging the former in the latter, and retaining the latter's corporate name. Two corporations, one in Georgia and the other in Alabama, were incorporated, each having the same name,—the Georgia Pacific R. Co. Each pointed westward; one from Atlanta, Ga., towards the Alabama line, and the other from that line towards Birmingham, Ala. It is reasonable to suppose that these two roads were intended to run in connection and continuation. These two roads consolidated, and the former sold out to the latter, and thus became an Alabama corporation, retaining the name, the Georgia Pacific R. Co. Another company, incorporated in Alabama as the Alabama Transit Co., had changed its name to that of "The Elyton & Aberdeen R. Co." Acts 1869-70, p. 299. The bearing of this road was westward from a point near Birmingham, and pointing to Mississippi, north of Columbus. These several

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solidation
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companies.

roads, the Columbus, Fayette & Decatur, deen, and the Georgia Pacific, then consolidated, and took the corporate name the Co. The agreement to consolidate, and pursuant to such agreement, recited that it was a new consolidated company for the purpose of owning, and operating a continuous line of road in the state of Georgia, through the state of Mississippi, to some point on the Mississippi river." This act of consolidated incorporation was passed about the close of the year 1881, under the Acts of 1876 (Sess. Acts, 249, Code 1876, § 1876). *facie*, the corporation could exercise only the powers conferred. We consequently held, in the case formerly before us, (79 Ala. 180), that with the exception of power the railroad corporation could not acquire an interest in lands which was neither necessary nor conducive to the carrying out the purposes of the corporation. We demurred to the bill, holding that for want of power the corporation it could not maintain the suit for. In the court below, after the reversal, the bill was sustained, and the acts of incorporation of some of the corporations were set out. Among them is that of the Alabama Transit Co., incorporated in 1869 under the general act of December 29, 1868 (Sess. Acts, 462). This act was amended by special statute approved March 29, 1869 (Sess. Acts, 299). Its provisions are "that the name of the Alabama Transit Co. shall be changed to the Aberdeen R. Co., and under that corporation name the company may sue and be sued, and shall have all the rights, privileges, and be subject to all the liabilities of a corporation created by the act authorizing the creation and regulation of railroads in the state, under which act said corporation was organized."

The general statute of December 29, 1868, under which the Alabama Transit Co. was incorporated, conferred upon it power to "acquire by purchase or gift, any lands in the vicinity of said road, through which the same may pass, so far as may be deemed convenient or necessary by said corporation, for the right of way, or *such as may be granted to the corporation of said road*, and the same to hold or convey to the directors may prescribe." The italicized words in the original text are: "roads incorporated under this statute entitled to receive, hold, and dispose of property given or granted to aid in their construction." The Aberdeen R. Co. had this right:

consolidated with and merged into the Georgia Pacific R. Co. It had acquired the power under the act of 1868, and the power was emphasized and confirmed by the special statute changing its name. Being a property right, presumably of pecuniary value, we must infer it was to some extent a consideration and moving inducement in the grant and acceptance of the charter. The repeal of part of the act approved December 29, 1868, by the later enactment approved March 8, 1876 (Sess. Acts, 249), did not and could not take away this vested right from railroad corporations, which had obtained charters under the older statute before its repeal by the later enactment. 1 Brick. Dig. p. 402, §§ 8, 9, 14; 3 Brick. Dig. p. 158, § 38 *et seq.*; *Thorington v. Gould*, 59 Ala. 461.

In 1871 the Columbus, Fayette & Decatur R. Co. was also incorporated under the general law of December 29, 1868, and during the same year the legislature of Mississippi granted to the company the corporate right to extend their road to Columbus in the state of Mississippi. The Alabama charter conferred all the rights guaranteed by the general statute of December 29, 1868, and the statute of Mississippi conferred similar powers on the extension—corporation—granted by it. The act of December 29, 1868, was not entirely repealed by the act of March 8, 1876. Certain subjects covered by the former statute were not touched by the latter. Among them is the provision for consolidating railroads. The following clause in section 21, act of 1868, was retained, and is yet the law: "And such new corporation shall possess all the rights, powers, and franchises conferred upon said two or more corporations." Code 1876, § 2008; Code 1886, § 1583.

It is contended for appellant that under the several consolidations above set forth the Georgia Pacific R. Co. had succeeded to all the rights, powers, and franchises which had pertained to the two companies, "the Elyton & Aberdeen," and "the Columbus, Fayette & Decatur R. Cos." and, as part and parcel of the same, had come into possession of the right to "acquire, by purchase or gift, lands in the vicinity of said road, or through which the same may pass, . . . such as may be granted to aid in the construction of said road." Act December 29, 1868, § 15 (Sess. Acts, 457). The precise scope of the argument is that the amendment shows the contents and dates of the said two acts of incorporation, thus showing their power to acquire and hold lands to aid in their construction; and, inasmuch as those corporations have become consolidated with the Georgia Pacific R. Co., that power is reserved and still exists in the latter company, which is but the resultant of the consolidation. This, it is contended, arms the Georgia Pacific R. Co. with the

Same—Consolidated companies.

requisite power to recover, hold, and convey the lands in controversy. It is not every consolidation of two or more railroad companies that transfers to and confers on the consolidated corporation "the powers, rights, and franchises conferred upon the two or more corporations." To accomplish that result the lines of the two or more railroads or contemplated railroads should bear such relation to each other or to the general enterprise as that, when completed, they may admit the passage of burden or passenger cars over two or more of such roads continuously, without break or interruption. Code 1886, § 1583 (2008). The amended bill and its exhibits fail to show that the railroads, or any two of them, which were consolidated or merged into the Georgia Pacific R. Co. were so situated as that the lines of any two or more of them, whether surveyed or contemplated, would bear such relation to each other or to the contemplated general enterprise that their chartered routes could be utilized in whole or in part in the construction or extension of a continuous line over which cars could run without break or interruption. Neither the averments of the bill nor anything in the exhibits gives us any information on this subject.

We are not able to affirm, from anything shown in the record, that by the consolidation the Georgia Pacific R. Co. succeeded to the right of any other company to acquire, recover, hold, or dispose of real property, or any interest therein, except such as may be necessary for the construction and operation of the railroad. We find no error in the ruling of the chancellor sustaining the demurrer to the bill.

The chancellor went further in his ruling, and, holding that the bill could not be amended so as to give it equity, he dismissed it. He thus, by an affirmative ruling, denied to complainant all right to amend. We are not able to affirm that the record on its face shows that it cannot be amended so as to give it equity, under the principles declared above. We fully concur with the chancellor in sustaining the demurrer to the bill, but hold that he erred in denying to complainant all right of further amendment. The court, having declared that "no further amendment can be made so as to show complainant's capacity to hold said lands," relieved complainant of the duty of asking leave to amend, which would otherwise have rested on him, as a condition of putting the court in error.

—Reversed and remanded.

Consolidated Company—Transfer of Land Grant—Construction of Articles.—The articles of amalgamation and incorporation of a consolidated railroad company contained a provision in the following terms: "And the said several parties, each for itself, hereby sells, assigns, transfers, grants, bargains, releases, and conveys to the said new and consolidated company and corporation, its successors and assigns forever, all its property, real, personal, and mixed, of every kind and description; all its capi-

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tal stock ; all its interests in the shares of its capital stock subscribed, but not fully paid for ; all credits, effects, judgments, decrees, contracts, agreements, claims, dues, and demands of every kind and description, and all rights, privileges, and franchises, corporate and otherwise, held, owned, or claimed by said parties of the first and second parts, or either of them in possession or expectation either at law or in equity." *Held*, that the articles were sufficient to transfer to the consolidated company lands granted by the federal government in aid of the construction of one of the roads, and that the conveyance was not open to the objection that it was not shown that such property was required for the purpose for which the company was organized, when the acts granting the land declared the purposes for which it was granted and provided the uses to which it should be put. *Tarpey v. Deseret Salt Co.*, (Utah) 17 Pac. Rep. 631.

Land Grant—Construction of Conveyance.—In *Shirley v. Waco Tap. R. Co.*, Tex. Sup. Ct., Jan. 22, 1889, it was held that a conveyance granted by a railroad company of "all and singular the charter rights, privileges, and franchises of every kind" then belonging to, or that should thereafter belong to the grantor, was not sufficient to convey land grants which were not directly connected with the operation of the road.

WASHINGTON AND IDAHO R. CO.

v.

NORTHERN PACIFIC R. CO.

(*Idaho Supreme Court, March 18, 1889.*)

Land Grant to Northern Pacific R. Co.—Grant in *Præsenti*.—Section 3. of the act of congress of July 2, 1864, provides "that there be, and hereby is, granted to the Northern Pacific R. Co. [for the purpose of securing the construction of a railroad and telegraph line, etc.] every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, . . . free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office," etc. *Held* to be a grant *in præsentia*, and to vest in the company an equity in the lands, subject to be defeated, however, on non-compliance with the terms of the grant.

Same—Right of Way over Public Lands.—*Held, also*, that lands included in such grant are not within the operation of the act of March 3, 1875, granting the right of way to railroads, etc.

APPEAL from District Court, Shoshone County.

Woods & Heyburn for appellant.

Albert Hagen and John H. Mitchell for respondent.

BERRY, J.—This case comes into this court on appeal from a judgment entered in favor of the defendant upon an order sustaining a demurrer to the complaint. Stripped of all minor questions, and which are not essential to the case, the main issue, and that on which all else in the case depends, is as to which party is entitled to the possession of

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certain parts of sections 25 and 27, in town 1 E., of Boise meridian, in Shoshone claims a right of way for its road through of March 3, 1875. It claims to have fulfilled that act, and compliance with all the rules of the land department of the United States. On the 3d day of November, 1886, it was denied the benefits of the act of March 3, 1875, what it claims to be. The complaint demands judgment against the company's ownership of a right of way for its road, and over these two sections of land, with its improvements, etc.

The defendant, on its part, claims to be entitled to the lands under the land grant to the Northern Pacific Railroad by congress, July 2, 1864. The lands are in the public domain, and subject to the operation of the laws of the United States, except such as are reserved by the plaintiff claims, unless they are removed from the public domain by that act by the grant previously made to the defendant by act of congress of March 3, 1875, grants a right of way complying with its conditions the right of way through the lands of the United States, except such as are reserved within "any military, Indian, or park reservation." The plaintiff shall be otherwise specially reserved from the public domain made by the plaintiff shows its right to a right of way through the lands, providing the defendant has not a vested right.

It is contended by the defendant that the lands within the 40-mile limit "of its grant are not within the meaning of the act of March 3, 1875, if they are private property, granted to the defendant for certain purposes, specified in the grant in which the defendant, prior to the act of March 3, 1875, had a vested right. In support of this claim the defendant cites section 3 of the granting act to the defendant providing "that there be, and hereby is, granted to the Northern Pacific R. Co. [for certain specific purposes declared] every alternate section of public land designated by odd numbers, to the amount of 36 sections per mile, on each side of said railroad, which the company may adopt, . . . free from pre-emption or other rights, at the time the line of said railroad is located and a plat thereof filed in the office of the general land-office," etc.

Whether this act did or did not vest in the defendant present property in these lands, which was at the time its plat of route should be filed, or pre-emption or other claims arising after the act, has been the subject of some decisions in the courts, and the decisions, at first

conflicting. We think this supposed conflict is more apparent than real, and arises chiefly from changed circumstances under which the same and similar acts have from time to time been considered. The policy of the United States with reference to the public lands has ever been to retain their primary disposal exclusively to itself. With that exclusive control it will allow no interference, either by state or territorial governments, nor by any means which itself does not institute and put in motion; and we are cited to no case, and know of no case, where the government of the United States has never allowed the public lands to be made subject to taxation and sale for taxes, under state or territorial laws, so long as it for any purpose holds the title. Improvements on public lands may be taxed, and often are taxed, as personal property, and sold for taxes, but the soil, never. The reason is obvious. A departure from this rule will not be presumed for reasons less than a plain declaration by congress of such intent. There is no such intent expressed in this grant, and the intent will not be implied as against the government. *Lavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 733. What the company may do, in pursuance of the expressed object of the grant, in the sale and transfer of equities in lands, whether earned and title perfected, or the equities still inchoate, is quite another thing.

For reasons satisfactory to congress, and under a clear right reserved in the government to do so, and by express provision of the act of July 17, 1870, the title to these lands has been retained in the government; and it will not, except through the authorized acts of the grantee, done in pursuance of the objects of the grant, and on full compliance by it, with its obligations to government, part with the legal title to the property granted. The making of these lands subject to taxation by territories or states was not one of the expressed objects of this grant. Its purpose was not to expose it to confiscation, but to devote it to the building of a railroad and telegraph line from Lake Superior to the Pacific. To do that, means were prescribed by congress by which the company might mortgage its franchises and property, including these lands, to raise money for that purpose; but to allow the lands to be encumbered by taxation would at once raise a barrier to the object for which the grant was made, and tend, at least, to defeat its real purposes. Any presumption that congress intended, by putting these lands in the hands of the company, practically in trust, with a beneficial interest in the trustee, for a specific purpose, to subject them to immediate taxation, as soon as the line of the road should be established, or even as soon as the lands should be earned by the completion of the road, or any section of the road, would necessarily lead to the most serious and absurd consequences; and if we were to

look no further than the original grant, with its expressed object and intent, with the known uniform policy of the government, in having no partner in the primary disposal of its soil, such a decision as that of *Northern Pac. R. Co. v. Traill County*, 115 U. S. 601, might have been reasonably expected. Such, however, is not the reason given for that decision. That was based on the fact that the government had a lien on all such lands for the cost of surveying, selecting, and conveying the same, which cost the grantees were to pay, and in default of which payment the government might be obliged to retake or redispense of the lands. The interest of the road in the lands is not such an interest as to subject the lands to territorial taxation, and so that case decides. But it does not follow from anything in that case that the beneficial interests of the company in the grant are any less, or any different, from that implied in the obvious meaning of the words of the statute, taken with other portions of the granting act, and the act of July 15, 1870, reserving this power in the government. In construing the act, the nature of the trust, the character and relations of the grantor to the property granted, its rights secured by holding the title, its uniform policy and practice in avoiding complications in the primary disposal of its lands, and the detailed statement of the object of the grant itself, must not be overlooked. Subject to these specified conditions, it seems clear that the conclusion arrived at in *Buttz v. Northern Pac. R. Co.*, 119 U. S. 55, 29 Am. & Eng. R. Cas. 455, must be taken as the true rule, in defining the estate and interest of the defendant in the lands so granted. Other cases define it quite as explicitly. In that case the court holds that the land in controversy, "and other lands in Dakota, through which the Northern Pacific was to be constructed, was within what is known as 'Indian Country' at the time the act of July 2, 1864, was passed. The title of the Indian tribes was not extinguished, but that fact did not prevent the grant of congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy,—a right to use the lands, subject to the dominion and control of the government. The grant conveyed the fee subject to this right of occupancy, and the railroad company took the property with this encumbrance." There is no question of "encumbrance" here; hence there was nothing to be "removed" before the rights of the company attached. The court declares that the company "took the property." The counsel cites on this point *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44, which case fully sustains this view; also *Leavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 733; *Missouri K. & T. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491; *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426, 5 Am. & Eng. R. Cas. 408,—all of which cases, considered with

reference to their particular circumstances, appear consistent with *Northern Pac. R. Co. v. Traill County*, cited above, and no reason appears to question the correctness of their conclusions.

It is not necessary to inquire as to which of the excepted classes of lands, named in the act of 1875, includes the sections in question in this action, or whether they are in either class. The United States had already granted these lands, subject, of course, to the reservations and conditions of the act of July 2, 1864, and to the requirements of the act of July 15, 1870, hereafter mentioned, when the act of March 3, 1875, was passed. It is admitted in the complaint that the sections of land here in question are now "within the forty-mile limit" of the defendant company; and from the complaint, which was demurred to, it is not apparent that they were not within such limits at any time. It is not pleaded that any previous location of the defendant's road had been definitely made, so as to leave these sections out of that limit, on the 3d of November, 1886, at which time full compliance with the act of 1875 was completed by the plaintiff; and the plaintiff became entitled to its right of way over government lands under that act, and we cannot look into the maps submitted, which are not a part of the complaint, nor indeed altogether consistent with each other, for the discovery of a fact of which the face of the complaint does not give notice. Undoubtedly, if such were the fact when the right of the plaintiff attached, and a change in the defendant's line was made afterwards, so as to include these sections, and it were so stated, such fact would demand attention. But such is not the condition of this case.

We see nothing in the point taken under the act of congress of July 15, 1870, "that while the cost of surveying, selecting, and conveying the lands granted to a railroad remains unpaid, the legal title of the lands remains in the United States; that the cost of surveying the land is a condition precedent to the right to receive the title from the government;" and that in such case the equities of the defendant are extinguished or impaired, as claimed under the authority of *Union Pac. R. Co. v. McShane*, 22 Wall. (U. S.) 444. The act, under reserved power to amend and modify the grant, merely imposes another condition precedent to the government's obligation to patent the lands, to-wit, that certain costs of survey, selection, and conveyance shall be paid. It goes no further, and we think this retention of title in the United States must be considered as a holding of the naked, legal title only, retained, primarily, at least, as security for the cost of surveying, selecting and conveying the lands, but leaving the equities of the company in the lands themselves entirely intact. Such, if we understand them, is the view taken by Judges Field and Deady in *U. S. v. Ordway*, 30 Fed. Rep. 35. It is

apparent therefore, that the defendant had a vested interest and property in this land, prior and superior to any claim of the plaintiff under the act of March 3, 1875. The judgment in this action should be affirmed.

Land Grants—Grant to Central Pacific R. Co.—Conveyance in *Præsent*.—The act of Congress of July 1, 1862, granting certain lands to the Central Pacific R. Co. in aid of its construction, conveyed the legal title *in præsent* to all the lands included in the grant, whether surveyed and selected or not. *Tarpey v. Deseret Salt Co. (Utah)*, 17 Pac. Rep. 631.

Same—Pacific Railroad Grants—Filing of Order of Withdrawal.—The acts of Congress of 1862 and 1864, granting lands in aid of the construction of a railroad and telegraph line to the Pacific Ocean, etc., operated as a grant of land to the railroad company upon condition subsequent, which could only be defeated by breach of condition and the divesture of title thereupon by proper legal proceedings on behalf of the United States. No other right than that of the railroad company could be acquired or initiated in any of the lands granted after the filing in the local land-office in the district on Jan. 30, 1865, of the order of withdrawal provided for in section 7 of the act of July 1, 1862. *United States v. Curtner*, 38 Fed. Rep. 1.

Same—Union Pacific R. Co. Grants—Transfer to Denver Pacific R. Co.—Under the Union Pacific Railroad Acts, the grant *in præsent* of public lands was made to aid the construction of a railroad from Kansas City to Cheyenne near Denver. The Denver Pacific R. & Tel. Co. had commenced the construction of a railroad from Cheyenne to Denver, and by the act of Congress of March 3, 1869, the defendant company was authorized to contract with the Denver Pacific Co. for the construction and operation of defendant's road between Denver and Cheyenne, and to transfer to the latter the lands granted to defendant to aid in the construction of that portion of the road. *Held*, that the only effect of the act of 1869 was to divide the grant between the two companies, and that the grant remained a continuous grant from Kansas City to Cheyenne. *United States v. Union Pac. R. Co.*, 37 Fed. Rep. 551.

Same—Construction of Grant—Lines Terminating at Right Angles.—Railroad land grants, as a general rule, are to be limited to lands situated at right angles to the general line of the road; but where two roads, having grants, connect at right angles to each other, and the land-office has construed the grant as embracing the land included in the outside angle, and has issued patents accordingly, and such construction has not been questioned for a period of fifteen years, and third parties have acquired intervening rights,—the court will not set aside such patents in a case of doubt as to the true construction of the acts. *United States v. Union Pac. R. Co.*, 37 Fed. Rep. 551.

Same—Union Pacific Land Grant—When Settler's Entry Attaches.—Under the provision of the Union Pac. Land Grant Act (12 St. 492), confining the lands granted to lands "to which a pre-emption of homestead claim may not have attached at the time the said road is definitely fixed," the company cannot claim lands for which an entry in proper form has been filed by a settler, although after the definite location of the road such entry is set aside because made by a person not entitled to hold the government claim. *McIntyre v. Roeschlaub*, 37 Fed. Rep. 556.

Same—Lieu Lands for School Purposes—Selection before Survey.—State selections of lieu lands for school purposes made upon lands unsurveyed by the United States are utterly void. Lands are not surveyed by the United States until a certified copy of the official plat of the survey has been filed in the local land office. *United States v. Curtner*, 38 Fed. Rep. 1.

676 CHESAPEAKE, OHIO, ETC., R. CO. v. DYER COUNTY.

Same—Notice of Title of Railroad Company.—The endorsement upon the map filed in the office of the register of the local land-office of the following memorandum, namely: "The odd numbered sections on this plat are granted to the Western Pac. R. Co." operates as official record notice of the right of the railroad company to parties purchasing under state locations subsequent to the filing of the map. *United States v. Curtner*, 38 Fed. Rep. 1.

Same—Suit to Set Aside Entry by Settler—Limitation—Laches.—The statute of limitations does not run against the United States so as to preclude it from bringing an action to set aside a patent to lands on the ground that the lands in question were included in a railroad grant, and such petition will not be dismissed on the ground that the claim is stale when the company has from the first been actively engaged in prosecuting its claim before the department of the interior. *United States v. Curtner*, 38 Fed. Rep. 1.

CHESAPEAKE, OHIO AND SOUTHWESTERN R. CO. *et al.*

v.

DYER COUNTY.

(Tennessee Supreme Court, May 28, 1889.)

Crossing—Duty to Maintain Bridge—Construction of Charter.—A charter which authorizes a company to construct its railroad over any highway "so as not to interfere with the free use of the same, and in such manner as to afford and leave in good repair" such highway, and which provides that the company "shall restore such" highway "to its former good condition or in a sufficient manner not to have unnecessarily impaired its usefulness," not only leaves the common law obligation of the company to maintain a bridge constructed by it over its road in full force, but declares and enforces that obligation. Overruling *Chesapeake, O. & S. W. R. Co. v. State*, 16 Lea (Tenn.), 300.

Same—Res Adjudicata—Indictment for Failure to Keep Bridge in Repair.—A judgment dismissing an indictment against a railroad company for failing to keep a bridge over its track in repair, is not a bar to a civil action brought by the county to recover the expense of repairing the same bridge, and for a mandatory injunction to the company to maintain it in future.

Same—Reconstruction of Bridge by County—Action to Recover Cost.—If a railroad company, in violation of its common-law and statutory duty, allows a bridge to fall into disrepair, and it is reconstructed by the county, an action may be maintained by the county against the company to recover the amount expended in replacing the bridge.

APPEAL from Chancery Court, Dyer County.

Suit in equity against the Chesapeake, Ohio & Southwestern R. Co. and the Newport News & Mississippi Valley R. Co. to recover the sum expended by Dyer county in reconstructing a bridge, and for a mandatory injunction requiring the defend-

ants to maintain the bridge in good repair. Complainants appeal from a decree dismissing the bill.

Marshall & Watson and *Latta & Richardson* for appellants.
H. Cummins and *Park & Draper* for appellees.

CALDWELL, J.—In the construction of its road through Dyer county some years ago, the Paducah & Memphis R. Co. made a deep cut in a hill over which the public road from Dyersburg to Trenton ran, and at the point of intersection erected an overhead bridge across the cut for the use of persons travelling upon the public road. After 10 or 12 years' use by the public the bridge fell into decay, became dangerous, and was taken down. In the mean time the defendants in this cause became successors of that company, and took charge of its road. They failing and refusing to replace the bridge, Dyer county was forced by public necessity to rebuild it, at the cost of several hundred dollars. To recover that sum, and to obtain a mandatory injunction requiring the defendants to keep the bridge in repair in the future, this bill was filed. Facts.

Complainants contend that the general law, and the charter of the original company, devolved upon it and its successors the duty not only of constructing the said bridge when the railroad was built, but also the duty of maintaining it in the future; while the defendants insist that the whole obligation so imposed was discharged by the erection of the bridge in the first instance.

It is a well-settled rule of the common laws resting upon the most obvious consideration of fairness and justice, that, where a new highway is made across another one already in use, the crossing must not only be made with as little injury as possible to the old way, but whatever structures may be necessary to the convenience and safety of the crossing must be erected and maintained by the person or corporation constructing and using the new way. Duty to restore crossing. *Railroad Co. v. City of Baltimore*, 46 Md. 445; *Eyler v. Allegany County Com.*, 49 Md. 269; *People v. Chicago & A. R. Co.*, 67 Ill. 118; *Dygart v. Schenck*, 23 Wend. (N. Y.) 446; 1 *Thomp. Neg.* 328, 343. The same principle, though not so fully stated, was recognized and applied by this court in the case of *Louisville & N. R. Co. v. State*, 3 Head (Tenn.), 523.

That such is the undoubted rule of the common law is fully conceded by the learned counsel of the defendants in argument before this court, the contention being that the charter under which defendants operate their road relieves them from the duty of maintaining the bridge, after having once constructed it in an acceptable and proper manner. That part of the charter relating to this question appears in the fifth clause, which is as follows: "Fifth. To construct their road and branches across any stream

of water, water-course, road, highway, or railroad so as not to interfere with the free use of the same, and in such manner as to afford and leave in good repair, and well constructed for public use, all such streams of water, water-courses, roads, highways, streets, and alleys, and shall restore the stream of water, road or highway, street or alley, thus intersected to its former good condition, or in a sufficient manner not to have unnecessarily impaired its usefulness or injured its franchises." Acts 1857-58, c. 42, § 49. Clearly, there is no express diminution of the company's common-law obligation to be found in this provision, nor do we think there is anything in the language used to authorize an inference that the legislature intended to diminish that obligation in the least degree. This view of the charter, without more, would leave the full measure of the common-law responsibility resting upon the company; but we are constrained to go further, and, upon a construction of the language of the charter, hold that it not only does not excuse the company from the continuous duty of maintaining the bridge in a good and safe condition, but unquestionably enforces that obligation.

The requirement that the railroad shall be so constructed as not to interfere with the free use of the public highway, and that the latter, at the point of intersection, shall be restored to its former good condition, so as not to impair its usefulness unnecessarily, implies and carries with it the obligation to keep such highway in that same state of repair and usefulness. The requirement, so construed, is both reasonable and just, and may well be said to be an embodiment of the principle that one must so use his own rights as not to take away or injure the rights of others. There was no good reason why the common-law burden of maintaining the bridge should be shifted from the railroad company and cast upon the county, when the former, and not the latter, was to reap the fruits of the road whose construction alone made the bridge a necessity; but, on the contrary, there was the best of reasons for requiring the company to bear all expenses necessary in constructing and keeping up the crossing, as we hold the legislature in fact intended, so that the county would be injured as little as possible, and have no greater burden imposed upon it in maintaining its public highway than it would have had if the railroad had never been constructed at all. Or, to state the same proposition a little differently, as applied to the facts of this case, it was contemplated and intended that the county should be saved harmless so far as could be, and yet permit the railroad to cross her highway in such a manner, and at such place, as might be necessary to the due exercise of the powers and the enjoyment of the franchises conferred upon it by the act.

Provisions of
defendant's
charter.

Charter does
not relieve
from obligation
to maintain
bridge.

REPAIR OF BRIDGE OVER

The construction we have given this provision is sustained by the courts of 1 the states, and by the current of author come *v. Leeds*, 51 Me. 313; *Veazie v. Per Co.*, 49 Me. 119; *Chicago, R. I. & P. R. Co. People v. Chicago & A. R. Co.*, 67 Ill. 11 County Com., 49 Md. 257; *State v. Minn (Minn.)*, 35 Am. & Eng. R. Cas. 250; *Nic N. H. R. Co.*, 22 Conn. 74; *Burritt v. C Conn.* 175; *Phoenixville v. Phoenix Iron See also to same effect, The King v. Ir 14 East*, 317; *Rex v. Inhabitants of Kent Kerrison*, 3 Maule & S. 526.

The text-writers, so far as we are advised, settled rule of construction. Says Mr. Pier railroad across highways often requires excavation and a greater or less change in the surface to restore the highway, as far as may be, and to erect and maintain structures necessary, is presumed to be incumbent on the out any express requirement imposed by statute 245. In speaking of the usual requirement company shall restore the highway which state, so as not to impair the latter's usefulness, marks: "The word 'usefulness' implies care appertains to the future as well as the present." Dom. § 198. "But such crossings and property to be restored by the railroad company to its former state, and so kept, as is consistent with the use of the company." 1 Ror. R. R. 456, 554. Mr. Thorpe's statute simply provides that the company shall restore the highway to its former state of usefulness, with a discretion as to the matter, . . . with the further duty of keeping that property in proper condition." 2 Wood, Ry. Law, 133 *v. Boston & L. R. Co.*, 133 Mass. 185, 328, and other cases. The same author, in the same volume: "The right to lay a railroad street or highway carries with it the obligation to keep it in a proper manner, but also to keep it in a proper manner, but also to keep it in a proper manner." *Worster v. Forty-second St. R. Co.*, 50 *v. Same*, Ib. 206. Under the head "corporation bound to repair," Mr. Thorpe's books afford many illustrations of this rule. If a corporation cuts a canal or mill-race across a highway, it must bridge the same in substantial manner, and in safe repair. . . . So the owner of a rail

must restore the highway by a bridge or otherwise, and, if a bridge, must keep the bridge in repair, or pay to any person the damages flowing from this neglect." 1 Thomp. Neg. p. 343, § 5. "Private corporations generally, canal companies, railway and other private corporations, are bound to repair all bridges erected by them, under their charters, over public highways, especially where a revenue is derived from them." 2 Am. & Eng. Encyc. Law, 556, and cases cited. Again: "Where a public company, as a navigation company, under the powers conferred by the legislature, destroyed a ford and substituted a bridge, it was held that they were liable to keep the bridge in repair. So, too, where such company cut through a highway, rendering a bridge necessary to carry the highway over the cut, the company are bound to keep such bridge in repair." 1 Redf. R. R. (3d ed.) p. 404, § 110. Same rule as to railways in England is stated by same author on page 399, § 108, sub-sec. 8. Upon very much the same principle it has been decided in Illinois that, where one railroad company condemns a right of way across the right of way of another railroad company, the amount recoverable by the latter from the former as compensation for the property taken should include "a sum sufficient to erect and maintain perpetually a bridge" rendered necessary by an excavation made under the tracks of the latter by the former. *St. Louis, J. & C. R. Co. v. Springfield & N. W. R. Co.*, 2 Am. & Eng. R. Cas. 487. Some of the cases go even further than we are called upon to go in this case, and hold that the duty to maintain the crossing of the highway is not only a continuous one, but that it also binds the company making it to enlarge and extend the bridge or crossing originally made, if, by increase of population and public travel, it becomes inadequate. *Cooke v. Boston & L. R. Co.*, 10 Am. & Eng. R. Cas. 328; *Manley v. St. Helen's C. & R. Co.*, 2 Hurl. & N. 840; *English v. New Haven & N. Co.*, 32 Conn. 241; *Burritt v. City of New Haven*, 42 Conn. 174; 1 Redf. R. R. p. 538, § 132.

The courts in a few of the states seem to have adopted a different rule of construction, and decided that a railroad company which intersects a public highway has discharged its full obligation to restore the highway to its former state of usefulness when it has once constructed a suitable bridge or crossing, and that it is not bound to keep it in repair. *Missouri, K. & T. R. Co. v. Long*, 27 Kan. 684, 6 Am. & Eng. R. Cas. 254; *Pittsburgh, Ft. W. & C. R. Co. v. Maurer*, 21 Ohio St. 421; *Brookins v. Central R. & B. Co.*, 48 Ga. 523. This latter construction was adopted by this court in the case of *Chesapeake, O. & S. W. R. Co. v. State*. 16 Lea (Tenn.), 300, which was an indictment against the company for failing to keep in repair the very crossing involved in the present litigation. The

decision in that case, however, was rested upon no other authority than that of the case of *Railroad Co. v. Parker*, (MS.) Though apparently going to the point for which it was cited, the facts of the latter case did not justify a decision of the question here involved. There it was sought to hold the company liable in damages for injuries claimed to have been received through the failure of the company to keep in repair "a small bridge built near its road-bed," at the intersection of a public county road. The obligation of the company to maintain the crossing itself, or an overhead bridge, as in the present case, was not and could not have been authoritatively considered or decided; so that the opinion in that case, so far as it is supposed to treat of the precise legal question now before us, is but *dictum*, and was not authority on the point for which it was cited in the 16 Lea Case. This being true, and believing, as we do, that the 16 Lea Case is not supported by sound reason, and that it is contrary to the intention of the legislature and the great weight of authority, we are constrained to overrule it as a precedent.

Since this litigation arose our legislature has passed the following statute: "That all persons, companies, corporations, or syndicates owning or operating a railroad or railroads in the state of Tennessee, be required to make and furnish good and sufficient crossings on the public highways crossed by them, and keep same in lawful repair, at their own expense." Acts 1889, c. 119, § 1. This opinion, however, is not in any sense, or to any extent, grounded upon that enactment, but it is based alone upon the common law and the charter construed.

Passing the construction of the charter, the defendants plead and rely upon the decision in the 16 Lea Case as *res adjudicata*. The sufficiency of this defence does not depend, of course, upon the authority of that case as a precedent, but upon the altogether different consideration as to whether or not the question now involved was so adjudged as to be binding upon the complainants (Dyer county and her bridge commissioners), and become a bar to this action.

Indictment for
nuisance—Res
adjudicata.

Without discussing or stating in detail the well-established rules by which the sufficiency of such a defence is to be determined, we are content to say, in brief, that it certainly is not made out in this case, because the parties in this and in the former litigation are not the same in fact or in privity of interest; and furthermore because an adjudication in a criminal prosecution is not a bar to a civil proceeding. 1 Greenl. Ev. § 537; Mil. Meig, Dig. § 1739, sub-sec. 2; 1 Whart. Ev. § 776. Then we hold that it was the duty of the defendants to replace the bridge in question, and that, having failed and refused to do so, they are liable to the county for the amount expended in replacing it for them. *Pennsylvania R. Co. v. Irwin*, 85 Pa. St.

336. That it may not be exactly the same structure in all respects that the defendants would have erected if they had undertaken the task on their own account cannot alter the fact of their liability, for the bridge is shown to be such as the necessities of public travel demand, and substantially the same as the one originally erected by the company, though slightly more to the convenience and advantage of the defendants. What has been said of the obligation of the original company is intended to apply with like force to these defendants, for the duty imposed by a charter in the first instance passes to and rests upon the successors to the first company. *People v. Chicago & A. R. Co.*, 67 Ill. 118; *Wasmer v. Delaware, L. & W. R. Co.*, 80 N. Y. 212, 1 Am. & Eng. R. Cas. 122; *Little Miami R. Co. v. Com. of Greene County*, 31 Ohio St. 338.

The bridge being now new, and in good condition, and there being nothing in this record to indicate that the defendants will longer refuse to maintain it after this adjudication of their duty so to do, the mandatory injunction sought by the complainants will not be granted. Let the decree of the chancellor dismissing the bill be reversed, and decree be entered here in conformity to this opinion. The defendants will pay all costs.

Obligation of Company to Construct and Maintain Crossings.—See *State v. Minneapolis & St. L. R. Co.* (Minn.), 35 Am. & Eng. R. Cas. 250, note, 260; *Palatka & Indian Riv. R. Co. v. State* (Fla.), 32 Ib. 191, note, 199; *New York & G. L. R. Co. v. State* (N. J.), 32 Ib. 186; *Gray v. New York & N. E. R. Co.* (Conn.), 29 Ib. 486, note, 490; note, 29 Ib. 439; *Gulf C. & S. F. R. Co. v. Greenlee* (Tex.), 23 Ib. 322; *City of Newton v. Chicago, R. I. & P. L. Co.* (Iowa), 23 Ib. 298, note, 20 Ib. 59; *Mann v. Central Vt. R. Co.* (Vt.), 14 Ib. 620; *Louisville, N. A. & C. R. Co. v. Smith* (Ind.), 13 Ib. 608, note, 610; *People v. Lake Shore & M. S. R. Co.* (Mich.), 13 Ib. 611, note, 614; *People v. New York, N. H. & H. R. Co.* (N. Y.), 10 Ib. 230; *Paducah & E. R. Co. v. Com.* (Ky.), 10 Ib. 318; *State v. Dayton & S. E. R. Co.* (Ohio), 5 Ib. 312; *Cooke v. Boston & L. R. Co.* (Mass.), 10 Ib. 328, note, 330.

WOODSTOCK IRON CO

v.

RICHMOND AND DANVILLE EXTENSION CO.

(129 U. S. 643.)

Location of Track—Contract with Construction Company to Change Location—Public Policy.—Where a construction company contracts with a railroad company to locate and construct the latter's road "by the nearest, cheapest, and most suitable route" between two points for a certain sum per mile, an agreement by which a manufacturing company agrees to donate lands for right of way, etc., and pay a sum to the construction company in consideration of the latter changing the route so as to deviate some miles from the shortest and most suitable route, and to cause the road to pass through a town in the development of which the manufacturing company is interested, is contrary to public policy, and a fraud upon the public, and cannot be enforced.

THIS case comes from the Circuit Court of the United States for the Northern District of Alabama. The complaint, which was filed in June, 1884, is as follows:

"The plaintiff, which is a corporation created by and under the laws of the state of New Jersey, claims of the defendant, a corporation created by and under the laws of the state of Alabama, and located and having its principal place of business in the county of Calhoun, in the state of Alabama, thirty thousand dollars for the breach of an agreement entered into by it on, to-wit, the 18th day of November, 1881, whereby and wherein said defendant agreed and promised that if said plaintiff would locate and construct, or cause to be located and constructed, the railroad of the Georgia Pacific R. Co. (or of the new consolidated company then being formed, and to be known as the 'Georgia Pacific R. Co.')

by way of the town of Anniston, it, the said defendant, would donate and pay to the said plaintiff, or as it might direct, the cash sum of thirty thousand dollars, to be paid in money as to one half—that is, fifteen thousand dollars—when the said Georgia Pacific R. Co. connected its line with the line of the Alabama Great Southern R. Co. at or above Birmingham, Ala., and the other half—that is, fifteen thousand dollars—when said line was connected with the line of the Louisville & Nashville R. Co. (the North & South Alabama R. Co.) at or above said city of Birmingham, provided said connections be made within three years

from date of said contract. And plaintiff avers that it did cause to be located and constructed the railroad of the said Georgia Pacific R. Co. by way of the town of Anniston; that the said Georgia Pacific R. Co. connected its line with the line of the Alabama Great Southern R. Co. at or above said Birmingham on, to wit, the 1st day of June, 1883, and with the line of the Louisville & Nashville R. Co. at or above said city on, to wit, the 1st day of July, 1883, yet, although the said plaintiff has complied with all the provisions of said contract on its part, the said defendant has failed to comply with the following provisions thereof, viz. : It has failed and refused, and still fails and refuses, to pay, though often requested so to do, any part of said sum of thirty thousand dollars, except the sum of six thousand three hundred and twenty-five dollars, whereby it has become and is indebted to said plaintiff as aforesaid; wherefore this suit. The said plaintiff claims of the said defendant the further sum of thirty thousand dollars for the breach of an agreement entered into by him on, to wit, the 18th day of November, 1881, in words and figures in substance as follows:

“ ‘ ANNISTON, CALHOUN CO., ALABAMA,
 “ ‘ November 18th, 1881.

“ ‘ The Woodstock Iron Co. makes to the Richmond & Danville Extension Co. the proposition following, that is to say; First. If the Richmond & Danville Extension Co. will locate and construct, or cause to be located and constructed, the railroad of the Georgia Pacific R. Co. (or of the new consolidated company now being formed, to be known as the “ Georgia Pacific R. Co.”) by way of the town of Anniston, the Woodstock Iron Co. will donate and convey, or cause to be donated and conveyed, by good and sufficient deeds, to the Richmond & Danville Extension Co., or as it may direct: (1) Strips or parcels of land each one hundred feet wide,—that is to say, fifty feet on each side of the centre line of the location to be fixed for said railroad in, over, and through all and sundry the tracts and lots of lands now owned and to be owned by the Woodstock Iron Co., wheresoever situated, on and along the line of said location outside of the corporate limits of the town of Anniston; and the Woodstock Iron Co. will, upon request of said extension company, at any time, proceed to clear the said strips or parcels of land from timber thereon, allowing, however, the said extension company to have and take therefrom all that part of timber useful to it for the purpose of construction and for cross-ties. (2) A strip or parcel of land in, over, and through the entire corporate limits of the town of Anniston, so far as owned by the Woodstock Iron Co., as follows,—that is to say, on the left or west side of the centre line of the location to be fixed for said railroad, from the point of entering to the point of leaving said corporate

limits, a width of fifty feet, measuring from said centre line, and on the right or east side of the centre line of the location to be fixed for said railroad, a width of fifty feet, measuring from said centre line from the point of entering said corporate limits to a point nineteen hundred and six and eight tenths feet short of a point agreed, at or about the near foot of a hillock situated in a field in a westerly direction from the depot of the Selma, Rome & Dalton road; thence for a length of thirteen hundred six and eight tenths feet to said point agreed, a width of one hundred and fifty feet, measuring from said centre line; and thence to a point of leaving said corporate limits a width of fifty feet, measuring from said centre line. Appended hereto is a tracing showing said strip or parcel of land. (3) All such additional strips or parcels of land within and adjoining the town of Anniston as the experimental location about to be made may show to be reasonably necessary for sidings and other tracks for the advantageous and convenient transaction of the business of the Georgia Pacific Railroad or Railway Co., and especially for siding or spare track along and to the right or east of the Selma, Rome & Dalton line, for convenient approach to the furnaces and for sidings or spare tracks from the main line, at or above the place of greatest width, for convenient approach to the cotton factory and to the presently to be established car-wheel and car works.

“ ‘The Woodstock Iron Co. will aid the work of construction, and especially so of the sidings or spare tracks for the furnace, by the judicious wasting of the furnace cinder and other material; and the said company will in a general way do all it can to facilitate the work and advance the business of the railroad company whose location it invites; and the Woodstock Iron Co. will donate and pay to the Richmond & Danville Extension Co., or, as it may direct, the cash sum of thirty thousand dollars, paying the same in money as to one half—that is, fifteen thousand dollars—when the Georgia Pacific Railroad or Railway Co. connects its line with the line of the Alabama Great Southern R. Co. at or above Birmingham, Alabama, and as to the other half—that is to say, fifteen thousand dollars—when the Georgia Pacific Railroad or Railway Co. connects its line with the line of [the] Louisville & Nashville R. Co. (the North & South Alabama R. Co.) at or above Birmingham, Alabama; the above to be paid only provided the Georgia Pacific Railroad or Railway Co. is so far completed as to make the connections above within three years from this date. In case the Richmond & Danville Extension Co. accepts the terms proposed above, this instrument shall have the effect of a binding contract upon the Woodstock Iron Co., but such acceptance must be in writing, and addressed to the president and secretary and treasurer of the Woodstock Iron Co. at Anniston, Alabama, within four months from the date

thereof; and, if the Richmond & Danville Extension Co. shall desire hereafter to build machine-shops for the Georgia Pacific Railroad or Railway Co. at the town of Anniston, will donate and convey to said extension company, or as it may direct, by good and sufficient deeds for that purpose, at least five acres of land at a convenient distance from the crossing of the Selma, Rome & Dalton road. If, however, this land is accepted for shops, the land shall be appropriated, and the shops built within four years from this date.

“ ‘In testimony whereof witness the signature of the president and secretary and treasurer and the corporate seal of the Woodstock Iron Co., this 18th day of November, 1881.

[Seal.]

“ ‘ALFRED L. TYLER, President.

“ ‘SAMUEL NOBLE, Sec’y and Treas.’

“And the plaintiff avers that it did accept the terms proposed by said instrument above set out, in a writing addressed to the president and secretary and treasurer of said Woodstock Iron Co., at Anniston, within four months from the date of said agreement and instrument, which said writing was delivered to said president and secretary and treasurer on, to wit, the 18th day of January, 1882, and is in words and figures in substance as follows:

“ ‘ATLANTA, GA., January 17th, 1882.

“ ‘Messrs. Alfred L. Tyler, President, and Samuel Noble, Secretary and Treasurer, of Woodstock Iron Co., Anniston, Ala.—GENTLEMEN: The Richmond & Danville Extension Co. hereby notifies you that it accepts the proposition in writing made by you on behalf of the Woodstock Iron Co. to said extension company, regarding the location and construction of the Georgia Pacific R. by the town of Anniston, the date whereof is Anniston, Calhoun county, Alabama, November 18th, 1881, and a copy of which is hereto appended.

“ ‘Respectfully,

JOHN W. JOINSTON,

“ ‘Vice-president Richmond & Danville Extension Co.’

“And plaintiff avers that said defendant was at that time engaged, among other things, in the business of making pig-metal and other products from iron ores, and making sales of the same; that its works were located in said town of Anniston, and that it owned large quantities of valuable property therein, and that the said railroad referred to in said contract was a road then in the process of construction, to be run from Atlanta, Ga., through the state of Alabama, to Columbus, in the state of Mississippi; and plaintiff avers that it did locate and construct the railroad of the said Georgia Pacific R. Co. by way of the town of Anniston by, to wit, the 1st day of January, 1883; that it did connect the line of said railway company with the line of the Alabama Great Southern R. Co., at or above said city of Bir-

mingham, by, to wit, the 1st day of June, 1883; and that it did connect the line of said railway company with the line of the Louisville & Nashville R. Co., at or above the said city of Birmingham, by, to wit, the 1st day of July, 1883; and has in all things fully complied with all the terms and stipulations of said agreement undertaken upon its part. Plaintiff further avers that said defendant has complied with the terms and stipulations of said agreement to this extent, and no further. It has donated and conveyed by good and sufficient deeds to the Georgia Pacific R. Co., as directed and requested by the plaintiff, the several strips and parcels of land for right of way and sidings of the railroad of said company, as stipulated and agreed in said agreement, and has paid to the said plaintiff on account of said cash payment of thirty thousand dollars agreed and undertaken to be made by said agreement the sum of six thousand three hundred and twenty-five dollars, paid in cars furnished and advanced by defendant to the Georgia Pacific R. Co., on account of said cash payment, at the request of plaintiff. But plaintiff further avers that, although it has fully complied with all the terms and stipulations of said agreement to be done and performed on its part, that although it located and constructed said railroad of the Georgia Pacific R. Co. by the way of the town of Anniston, and connected the line of said railroad with the respective lines of the Alabama Great Southern R. Co. and the Louisville & Nashville R. Co. within the time and at the points agreed on, as is hereinbove fully set out and shown, the defendant has wholly failed and refused, and still fails and refuses, although often requested to do so, to pay to said plaintiff said sum of twenty-three thousand six hundred and seventy-five dollars, the balance due and unpaid upon said cash sum of thirty thousand dollars donated and agreed to be paid to plaintiff by said defendant upon the making of said connections as aforesaid, and by reason of the several matters and things set out and alleged herein the said defendant became and is indebted to the plaintiff in said sum of twenty-three thousand six hundred and seventy-five dollars, with interest thereon from date of the making of such connections, but has failed and refused, and still fails and refuses, to pay the same; wherefore this suit."

To the complaint the defendant filed a demurrer, and also several pleas. The demurrer was to the effect that the contract set forth as the foundation of the action was without consideration, and was contrary to public policy and void. The demurrer was overruled, and leave given to the defendant to file additional pleas. The original pleas were five in number, and to these six more were added. Of the original pleas, one amounted to the general issue, denying the promise and undertaking in the manner and form alleged in the complaint; and

one amounted to a plea of *ultra vires*, setting forth the charter of the defendant, showing the object of its incorporation to be the manufacture of pig-metal and other products of iron ore, and their sale, connecting with that business all such operations as are usual and incidental thereto, and denying authority, under the charter, to make the agreement mentioned in the complaint. A demurrer to this last plea was sustained by the court.

Of the additional pleas two only require notice,—the tenth and eleventh. The tenth plea is given in full below, and so much of the eleventh plea as is necessary to its comprehension. "Plea 10. And the said defendant, for further answer to the complaint, says that, at the time of the making of the alleged agreement stated and set forth in the complaint, plaintiff was engaged in locating and constructing the Georgia Pacific R. under a contract with the Georgia Pacific R. Co., under and by which plaintiff agreed with said Georgia Pacific R. Co. to locate and construct said railroad by the nearest, cheapest, and most suitable route, from Atlanta, Ga., through Alabama, to Columbus, in the state of Mississippi, for a consideration to wit, twenty thousand dollars per mile for each and every mile of said road so located and constructed; that John W. Johnston, who negotiated and executed said contract with the defendant for plaintiff as vice-president, was, at the time said agreement was made, a stockholder and director of the Richmond & Danville Extension Co., and was also a stockholder and director and officer of the Georgia Pacific R. Co.; that the Georgia Pacific R. Co. was at said time, and is now, a separate and distinct company, and in nowise connected with plaintiff, except that some of the stockholders of said Georgia Pacific R. Co. were also stockholders in said Richmond & Danville Extension Co., and plaintiff was locating and constructing said road under its contract with said company as aforesaid; that in causing said road to be built via Anniston it was necessary to deflect the same from its nearest, cheapest, and most natural route from Atlanta to Columbus a great number of miles, to wit, five miles, at a great additional cost to said Georgia Pacific R. Co., to wit, one hundred thousand dollars, and defendant avers that said alleged agreement on defendant's part to influence the location of said railroad, and to donate and pay to said plaintiff, among other things, the cash sum of thirty thousand dollars if plaintiff would locate and construct, or cause to be located and constructed, the railroad of the Georgia Pacific R. Co. by way of the town of Anniston, was and is contrary to public policy, and void, and ought not to be enforced against defendant or in favor of plaintiff." Plea No. 11, after repeating the first paragraph of plea No. 10, alleges "that John W. Johnston, who negotiated and executed said contract with defendant for plaintiff as vice-president, was at the time a stockholder, director, and

officer of the Georgia Pacific R. Co.; and that he went to Anniston, where defendant resided, and did business, and represented to defendant that he was a director and officer of the Georgia Pacific R. Co., and also a stockholder, director, and officer of the Richmond & Danville Extension Co., and could control and induce the location and construction of said Georgia Pacific R. via the town of Anniston, and would do so if the defendant would donate and pay to plaintiff the said sum of thirty thousand dollars in cash, and deed to plaintiff, or as it might direct, the large quantity of real estate described in the complaint, which defendant avers was of value, to wit, twenty thousand dollars; and that said Johnston then and there informed the defendant that, unless defendant acceded to his said demand to pay plaintiff said sum of money, and convey to plaintiff, or as it might direct, the large quantity of valuable real estate aforesaid, said road would not be constructed by the town of Anniston, but would be constructed by way of the town of Oxford, which said town is within three miles of the town of Anniston, and is a rival market to said town of Anniston, and thence direct to Birmingham, along the line of a preliminary survey already made; and to secure the location and construction of said road via the said town of Anniston, and to prevent the locating and building of said road by way of the rival town of Oxford, to the exclusion of the town of Anniston, defendant was forced to agree, and did agree, to pay the said sum of thirty thousand dollars in cash, and to convey to plaintiff, or as it might direct, the large quantity of valuable lands described in the complaint, as aforesaid."

To these pleas a demurrer was filed by the plaintiff, and sustained by the court. The case was tried upon the general issue by a jury, which rendered a verdict in favor of the plaintiff, assessing its damages at \$27,067.42, upon which judgment was entered, with costs, to review which the case is brought here on writ of error.

John B. Knox for plaintiff in error.

H. C. Tompkins for defendant in error.

FIELD, J.—As appears from the pleadings, which are set forth in the above statement, some time previous to November, 1881, the plaintiff below, the Richmond & Danville Extension Co., a corporation created under the laws of New Jersey, entered into a contract with the Georgia Pacific R. Co., a corporation created under the laws of Georgia, to locate and construct for the latter company, by the nearest, cheapest, and most suitable route, a railroad from Atlanta, in Georgia, through Alabama, to Columbus, in Mississippi, at the rate of \$20,000 a mile, to be paid in whole or part

Facta.

in the bonds of the railroad company; and in November, 1881, it was engaged in locating and constructing the road under the contract. At that time the defendant below, the Woodstock Iron Co., a corporation created under the laws of Alabama for the manufacture and sale of products of iron ore, was doing business at the town of Anniston, in that state; and it then made a formal proposition in writing to the extension company that if it would locate and construct, or cause to be located and constructed, the railroad by way of the town of Anniston, then the iron company would donate and convey, or cause to be donated and conveyed, to the extension company sundry parcels of land, both within and without the corporate limits of the town, for the location of the road, and which might be necessary for sidings or spare tracks; and would also donate and pay to the extension company \$30,000,—one-half when the road made a connection with the line of the Alabama Great Southern R. Co. at Birmingham, Ala., and the other half when the road made a connection with the line of the Louisville & Nashville R. Co. at that place; the payments to be made provided the road should be so far completed as to make the connections designated within three years. The proposition was formally accepted in writing by the extension company, through its vice-president, John W. Johnston. Pursuant to this contract, the extension company located and constructed the railroad by way of the town of Anniston by the 1st of January, 1883, and made the connections specified, within the period designated, and complied in every respect with its terms. The Woodstock Iron Co. complied with the contract only in part. At the request of the extension company, it conveyed to the railroad company the several parcels of land mentioned, and also upon like request furnished it with cars to the value of \$6325. For the balance, amounting to \$23,675, the present suit was brought, and the principal question presented to the court below, and to this court, is whether the contract is obligatory upon the defendant, or whether it is void as being against public policy.

In determining this question, it must be borne in mind that the contract of the extension company with the Georgia Pacific R. Co. was to locate and construct the road "by the nearest, cheapest, and most suitable route from Atlanta, Ga., through Alabama, to Columbus, in Mississippi," for the consideration of \$20,000 a mile, and that it is averred in the pleadings and admitted by the demurrer, that, in causing the road to be located by way of Anniston, it was necessary to deflect the same from the nearest and cheapest and most natural route between the designated *termini*, a distance of five miles, at an additional cost of \$100,000. In the light of these facts, there can

be but one answer given to the question presented respecting the contract between the iron company and the extension company, namely, that it was a void contract, immoral in its conception, and corrupting in its tendency. It was a contract by an employee of a railroad company with a third party, for a consideration to be received from that third party, to violate its engagement with its employer in the important business of locating and constructing a railroad, and instead of selecting the shortest, cheapest, and most suitable route, to locate the road by a longer route, and thus impose an unnecessary and heavy burden upon its employer. The proposition of the iron company, which was accepted, was to pay the extension company for a breach of its duty. In plain language, it was nothing less than the offer of a bribe to the latter company to be faithless to its engagements, and to do with reference to the business in which it was engaged what would amount to little less than robbery of its employer. The transaction on the part of the iron company was none the less offensive because of the threats of the extension company, made by its vice-president, who was also a director and stockholder of the railroad company, that, if the land and money mentioned were not donated, it would cause the road to be located away from Anniston by the rival town of Oxford. The threats did not excuse, much less justify, the offer.

We have thus far considered the case as one only between private parties, where an employee has agreed, for a money consideration, to violate his obligation to his employer; but there are other circumstances which add to the offensiveness of the transaction. The business of the extension company was one in which the public was interested. Railroads are for many purposes public highways. They are constructed for the convenience of the public in the transportation of persons and property. In their construction without unnecessary length between designated points, in their having proper accommodations, and in their charges for transportation, the public is directly interested. Corporations, it is true, formed for their construction, are private corporations, but, while their directors are required to look to the interests of their stockholders, they must do so in subordination to and in connection with the public interests, which they are equally bound to respect and subserve. All arrangements, therefore, by which directors or stockholders or other persons may acquire gain, by inducing those corporations to disregard their duties to the public, are illegal, and lead to unfair dealing, and, thus being against public policy, will not be enforced by the courts. In this case the extension company, to which the duty of locating and constructing the railroad between its *termini* was intrusted, in agree-

Contract was immoral in conception and against public policy.

Contract invalid as wrong upon public.

ing, for a consideration offered by a third party, to disregard that duty, and locate and construct the road by a longer route than was required, not only committed a wrong upon the railroad company by thus imposing unnecessary burdens upon it, to meet which larger charges for transportation might be called for, but also a wrong upon the public.

The case of *Fuller v. Dame* is instructive on this head. 18 Pick. (Mass.) 472. It there appeared that Dame, the defendant, was the

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owner of a large tract of land and flats situated on Sea street, and between it and Front street, on the south side of Boston, which would be greatly enhanced in value if the Boston & Worcester R. Co. would locate one of its depots between those streets and easterly of Front street. To induce the company to make such location, it was supposed to be necessary to form an association, which would pay to it a large sum of money, and furnish a large tract of land for the depot, besides making other donations; and, to provide the money and land, also to form a company to purchase the flats and land between the streets named, to be held as joint stock, and laid out in due form and shape for sale. Fuller agreed to aid Dame in getting up such company, and in inducing the railroad company to fix its termination and principal depot between those streets, Fuller being himself of opinion that the railroad ought, from a view of the public good and the good of its stockholders, to enter the city on the southerly side, and have its principal depot there. In consideration of such agreement Dame gave his note for \$9600, payable to Fuller in three years, the note being deposited with third parties, to be delivered to him when the principal depot of the railroad company for merchandise was constructed between the streets mentioned. Fuller was at the time of the agreement a stockholder in the railroad company. The road having been completed, and the principal depot located between the streets mentioned, and the note not being paid, suit was brought upon it. It was adjudged that the contract was contrary to public policy, and that the note given in consideration of it was therefore void. In coming to this conclusion the court considered somewhat at large the ground upon which contracts of this character were avoided, and held that it was because they tended to place one under wrong influences, by offering him a temptation to do that which might injuriously affect the rights and interests of third persons, and that the case before it was within the operation of this principle, the contract tending injuriously to affect the public interest in establishing the fittest and most suitable location for the termination of the Boston & Worcester R. for the accommodation of the public travel. It is true the road was constructed and located by the corporation at the expense of private parties

under the sanction of the legislature, incorporated for that purpose, who were to be remunerated by a toll levied and regulated by law; and it was left to its directors to fix the termination and place of deposit. But the court added: "In doing this a confidence was reposed in them, acting as agents for the public,—a confidence which, it seems, could be safely so reposed, when it is considered that the interests of the corporation as a company of passenger and freight carriers for profit was identical with the interests of those who were to be carried, and had goods to be carried; that is, with the public interest. This confidence, however, could only be safely so reposed under the belief that all the directors and members of the company should exercise their best and their unbiased judgment upon the question of such fitness, without being influenced by distinct and extraneous interests, having no connection with the accommodation of the public or the interests of the company. Any attempt, therefore, to create and bring into efficient operation such undue influence, has all the injurious effects of a fraud upon the public, by causing a question which ought to be decided with a sole and single regard to public interests to be affected and controlled by considerations having no regard to such interests. It is no answer to say that, by the act of incorporation, the executive authority was vested in a board of directors, and Mr. Fuller was not a director. He was a member of the company, and might be chosen a director. He was an elector of the directors, and they were directly responsible to the stockholders. The immediate act of location was with the directors, but the efficient authority was with the members and stockholders of the corporation, who elect the directors. The election may depend upon the known views and opinions of candidates upon this very question of location. They had a right to his disinterested judgment and advice upon the question of location, and this could not be exercised while he held and relied on a promise for a large sum of money, the payment of which depended upon the decision of this question by the directors."

The case before us is much stronger than the one thus decided by the supreme judicial court of Massachusetts. There the contract was held invalid because made with a stockholder of the company, by which he promised, for a pecuniary consideration, to endeavor to procure the company to locate one of its depots at a particular place in the city. Here the contract was with an employee of the company to induce it to disregard its obligations, and the principal person making that contract on the part of the employee was a director and stockholder of the company which was to be thus seriously affected.

The principle, which is so clearly and forcibly stated in *Fuller v. Dame*, has been applied in numerous instances by the highest

courts of different states, to avoid contracts made to influence railroad companies in selecting their routes and locating their depots and stations, by donations of land and money to some of its directors or stockholders or agents. Thus in *Bestor v. Wathen*, 60 Ill. 138, it appeared that in 1849 the legislature of Illinois incorporated a company to build a railroad from a point on the Mississippi river to Peoria, and that in 1852

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the charter was amended so as to authorize the extension of the road from Peoria eastward to the state line. In 1855 the company made a contract with the firm of Cruger, Secor & Co., by which the latter undertook the construction and equipment of the road. In 1856, while engaged upon this work, the members of the firm, together with Bestor, the president of the railroad company, Sweat, one of its directors, and Smith, its construction agent, entered into a contract with Wathen and Gibson, the defendants, by which the latter, being the owners of 160 acres of land, agreed, in consideration that the road then in process of construction should cross the Illinois Central R. where their land was situated, the land would be laid out into town lots and sold, and after proceeds amounting to \$4800 had been received, which were to be retained by Wathen and Gibson, a conveyance of an undivided half of the residue should be made to the other parties. The only consideration for this agreement, aside from the location of the road, was that the other parties should assist and contribute to the building up of the town on the land. The road was constructed across the Illinois Central, and Wathen and Gibson laid out the land into lots, and proceeded to sell the same, and the town of El Paso was built on the land and an adjoining tract. In 1863 the plaintiffs filed their bill against Wathen and Gibson for an account of the sales and a conveyance of the undivided half of the lots unsold. The court held the contract void as against public policy, and dismissed the suit, and the decree in this respect was affirmed by the supreme court of the state; that court observing that when the people through their legislature grants to a company the right of eminent domain for the purpose of constructing a railroad it is upon the supposition that the road will bring certain benefits to the public, and that, when subscriptions are made to its stock, the money is subscribed upon the understanding that the officers intrusted with the construction of the road will so locate its line and establish its depots as to bring the highest pecuniary profit to the stockholders compatible with a proper regard for the public convenience; that those alone are the considerations which should control officers of the road, and, so far as they permit their official action to be swayed by their private interests, they are guilty of a breach of trust towards the stockholders, and a breach of duty to the public at large; and it

added: "A court of equity will not enforce a contract resting upon such official delinquency, or even tending to produce it. Such is the character of the contract before us. If we enforce it we lend the sanction of the court to a class of contracts, the inevitable tendency of which is to make the officers of these powerful corporations pervert their trust to their private gain, at the price of injury at once to the stockholders and to the public. Rendered into plain English, the contract in this case was a bribe on the part of Wathen and Gibson to the president and other officers of the railway company, and to the contractors who were building the road, of an undivided half of one hundred and sixty acres of land, in consideration of which the road was to be constructed on a certain line and a depot built at a certain point. Now, if this was the best line for crossing the Illinois Central, considered with reference to the interest of the stockholders and of the public, then it was the duty of the officers of the company to establish it there; and if they intended so to do because it was the proper line, but professed to be hesitating between this and another line in order to secure for themselves the contract under consideration, as is somewhat indicated by the evidence, then they were practicing a species of fraud upon the defendants, and using a false pretext in order to acquire defendant's property without consideration. If, on the other hand, this line was not the best, but was adopted because of this contract, the case is still stronger against the complainants. If such was the fact, they are asking the court to enforce the payment of a bribe, the promise of which induced them to sacrifice their official duty to their private gain. If, as a third contingency, the choice lay between this line and another equally good, but not better, and they were influenced by this contract to adopt this line, then, although neither the company nor the public has been injured, yet the defendants have made their official power an instrument of private emolument in a manner which no court of equity can sanction. In this particular case no wrong may have been done, and yet public policy plainly forbids the sanction of such contracts, because of the great temptation they would offer to official faithlessness and corruption." The doctrine of this case was approved by the supreme court of Illinois in *Linder v. Carpenter*, 62 Ill. 309, and in *St. Louis, J. & C. R. Co. v. Mathers*, 71 Ill. 592. *Holladay v. Patterson*, decided by the supreme court of Oregon (5 Or. 177), is also in harmony with *Fuller v. Dame* and *Bestor v. Wathen*, the court following a similar course of reasoning to that adopted in those cases. That doctrine and reasoning are also often applied where the reward or money consideration for taking a particular route or establishing a station or depot at a particular place is offered directly to the railroad company

Authorities.

instead of to its directors, stockholders, or agents. But we do not refer to them, because there are exceptions or qualifications in the application of the doctrine in such cases requiring explanation, as where a subscription is conditioned upon the adoption of a particular route, or the construction of a station or depot at a particular place. *Pacific R. Co. v. Seely*, 45 Mo. 212; *Racine County Bank v. Ayres*, 12 Wis. 570; *Fort Edward & Ft. M. Plank-Road Co. v. Payne*, 15 N. Y. 583. There is no exception in any decision called to our attention as to the character of a contract, when, for a pecuniary consideration, directors, stockholders, or agents of a company undertake to influence its conduct in these matters. Indeed, the law is general that agreements upon pecuniary considerations, or the promise of them, to influence the conduct of officers charged with duties affecting the public interest, or with duties of a fiduciary character to private parties, are against the true policy of the state, which is to secure fidelity in the discharge of all such duties. Agreements of that character introduce mercenary considerations to control the conduct of parties, instead of considerations arising from the nature of their duties, and the most efficient way of discharging them. They are therefore necessarily corrupt in their tendencies. As we said in *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 48, 56, "that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution," so we said of agreements like the one in this case. They are against public policy, because of their corrupt tendency, whether lawful or unlawful means are contemplated or used in carrying them into execution. "The law," as said in that case, "looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country." *Oscanyan v. Winchester R. A. Co.*, 103 U. S. 261, 274. From the views expressed it follows that the court below erred in sustaining the demurrers to the special pleas above mentioned, and it is not necessary, therefore, to consider the other pleas. The judgment must be reversed, and the cause remanded with instructions to overrule the demurrers to the above pleas, and take further proceedings not inconsistent with this opinion, and it is so ordered.

Validity of Agreements to Secure Location of Depot. See *Louisville, N. A. & C. R. Co. v. Sumner (Ind.)*, 24 Am. & Eng. R. Cas. 641; *Township of Nottawasaga v. Hamilton & N. E. R. Co. (Ont.)*, *post*, p. 697, and note.

CORPORATION OF THE TOWNSHIP OF NOTTAWASAGA

v.

HAMILTON AND NORTHWESTERN R. CO.

(16 Ont. App. Rep. 52.)

Station—Agreement to Erect and Establish—Construction.—By agreement dated May 19, 1873, defendants, in consideration of a bonus of \$300,000 granted to them by a section of the county of Simcoe, covenanted to "erect, build, and complete good and sufficient and suitable station buildings for passengers and freight" at five certain places within the township; to "establish at each of the places hereinbefore mentioned regular way stations;" and to "well and sufficiently keep and maintain the said five stations above mentioned with all such suitable, necessary, and proper buildings as the business done or capable of being done at the said stations respectively may require for seven years after the trains shall have commenced to run on the said road and (to) undertake to do the passenger and freight business of the county at said stations." By a further agreement dated May 25, 1878, defendants, in consideration of a bonus of \$20,000 granted to them by the plaintiffs, covenanted to "erect, build, and complete good and sufficient and suitable station buildings for passengers and freight on the line of the said railway at the several places following in the said township," five places being specified, and to "establish at each of such places regular way stations." This agreement provided that the route of the railway through the township as defined in the former agreement might be deviated from to such an extent as to admit of the stations being located at the points mentioned in the second agreement, and "that the places herein defined for stations shall be taken to be in substitution for the places mentioned in such former agreement." Defendants erected stations at the points specified, three of these stations being respectively called A., G., and N. Trains commenced to run on the line in the year 1879. In 1880, plaintiffs being dissatisfied with the mode in which the stations at G. and N. were being maintained, brought an action against defendants for specific performance of the agreements. In this action a consent decree was pronounced and an injunction granted restraining the defendants from ceasing to maintain the stations except in a certain manner in the decree specified. The decree contained no limitation or other provision as to the time during which the stations were to be maintained, though this question had been raised at the hearing of the action. In 1886, after the expiration of the seven years, defendants made changes in their mode of maintaining the station at A., and kept it open for about four hours a day only. Plaintiffs were dissatisfied and this action was thereupon brought by them to compel specific performance of the agreements. *Held*, that the word "establish" does not in itself mean "maintain and use forever;" that the seven years' limitation applied to the substituted stations; and that defendants were not bound to maintain them after the expiration of that time.

Same—Res Adjudicata—Suit for Specific Performance.—*Held* also, that

the decree in the former action did not constitute the question of the seven years' limitation *res adjudicata*, there being no adjudication on that question, and in any event an adjudication on that question being unnecessary at the date of the former action.

Same — Evidence — Admissibility of Representations at Election Meetings.—At the trial, evidence was admitted on behalf of the plaintiffs of representations made by directors of defendant company, at meetings held to consider the question of granting the second bonus, to the effect that by the second agreement defendants would be bound to maintain the stations for all time. *Held*, that this evidence was clearly inadmissible.

THIS was an appeal by the defendants from the judgment of Robertson J., whereby the plaintiffs were granted the relief prayed for in their statement of claim, with costs.

The action was brought by the plaintiffs against the defendants to compel the specific performance by the defendants of two agreements entered into by them in regard to maintaining the station at Avening on the defendants' line of railway.

By an agreement entered into on the 19th day of May, 1873, between the defendants and the plaintiffs, the defendants, in consideration of a bonus of \$300,000 which it was proposed that a portion of the county of Simcoe, of which the township of Nottawasaga forms a part, should give the defendants, among other things covenanted, as follows: "Thirdly. That they, the said company, their successors and assigns, shall and will erect, build, and complete good and sufficient and suitable station buildings for passengers and freight on the line of said railway at the several places following, that is to say: First, at or so near to the said village of Avening as possible to the east of the road; secondly, at or as near to the said village of Creemore as possible; thirdly, at or as near as possible to the side line between said lots fifteen and sixteen in the seventh concession; fourthly, at or as near to the said village of Duntroon as possible; and fifthly, at or as near to the said village of Nottawa as possible;—and shall and will establish at each of the places herein before mentioned regular way stations; and Fourthly. That they, the said company, their successors and assigns, shall and will well and sufficiently keep and maintain the said five stations above mentioned, with all such suitable, necessary, and proper buildings as the business done or capable of being done at the said stations respectively may require for seven years after the trains shall have commenced to run on the said road, and shall and will undertake to do the passenger and freight business of the county at said stations."

By a further agreement, made on the 25th day of May, 1878, between the defendants and the plaintiffs, in consideration of a further bonus of \$20,000 granted to the defendants by the plaintiffs in order to assist the defendants in the construction of a portion of the Collingwood section of their railway, the defend-

ants, among other things, covenanted with the plaintiffs as follows: "The said company do hereby, for themselves, their successors and assigns, covenant, promise, and agree to and with the said township, their successors and assigns, that in the event of the said by-law being ratified by the electors entitled to vote thereon, and being finally passed and taking effect, and the said bonus granted, the said company in the construction of that portion of the Collingwood section of the company's line extending from the point to which the same has been constructed at or near the village of Glencairn, to the town of Collingwood, shall and will erect, build, and complete good and sufficient and suitable station buildings for passengers and freight, on the line of the said railway, at the several places following in the said township, that is to say: First, on lots five and six in the second or third concessions; second, on lots eight or nine in the fourth, or lot nine in the fifth, concession; third, at or near the side line between lots fifteen and sixteen in the seventh concession, and as far west as possible; fourth, on lot twenty-four or twenty-five in the eighth concession, and not farther than three quarters of a mile from Hurontario street; fifth, within half a mile of the village of Nottawa, and either on the east or west side of Hurontario street; and shall and will establish at each of such places regular way stations."

The agreement also contained the following provisions for a change of the route of the line of the railway as defined in the first agreement: "It is hereby agreed by and between the said company and the said township that the route of the line of the said railway through the said township, as mentioned and defined in and by a certain agreement made between the said company and the said township bearing date the 19th of May, 1873, may be deviated from to such an extent as to admit of the stations on such portions of the line of the said railway being placed and located at the points hereinbefore mentioned, and it is admitted and agreed that such deviation has been found necessary and expedient from natural and engineering difficulties, and it is further agreed that it shall not be incumbent on the said company to erect stations at the places mentioned in such former agreement, but that the places herein defined for stations shall be taken to be in substitution for the places mentioned in such former agreement."

By-laws were duly passed for carrying into effect the provisions of the agreements, and these by-laws were submitted to the electors and carried by their votes. The defendants received the bonuses, constructed in due course their line of railway, and erected stations at the places mentioned in the agreements; three of these stations being respectively called Avening,

Glenhuron, and Nottawa. Trains commenced to run on the line of the railway in the month of July, 1879.

In the year 1880 the plaintiffs, being dissatisfied with the mode in which the stations at Glenhuron and Nottawa were being maintained by the defendants, filed a bill in the then court of chancery against the defendants, complaining of the non-compliance of the defendants with the terms of their agreements, and praying for specific performance of the agreements. The defendants alleged by way of answer that they had done and were doing all that was required under the agreements. That action came on for trial at the town of Barrie, on the first day of June, 1880, and a consent decree was arrived at except as to the question of the time during which the stations in question were to be maintained. As to this question some discussion took place. The notes of the presiding judge at the trial are as follows:

“NOTTAWASAGA v. H. & N. W. R. Co.

“*Mr. Rye* and *Mr. Pepler* for plaintiffs.

“*Mr. Boulton* for defendants.

“A consent decree has been come to except on one point.

“Agreement:—19th May, 1873, 25th May, 1878.

“*Mr. Boulton*.

“By the 1st agreement:—Company will provide, keep, and maintain seven years. 2d agreement:—Wording is peculiar, merely an agreement; provide stations at certain places—but the limitation of seven years.

“In the 1st agreement there are the words ‘keep and maintain.’ This is to be for all time if it were not qualified by the word seven years.

“In the 2d agreement the words are ‘erect, build, and complete and establish,’ this does not necessitate the keeping them up. See *Goyeau v. Great Western R. Co., E. & A.; Wallace v. Great Western R. Co.*

“I think the declaration should be that—declare that the defendants are bound to erect, build, complete, and establish these stations under the agreements entered into between them and the plaintiffs, and order them to be kept in the decree. A declaration made and then a consent decree based on it.”

The plaintiffs also put in in evidence (subject to objection) the indorsement on the brief of counsel for the plaintiffs at this trial. This indorsement is as follows:

“V. C. B.

1 June 1880.

“Consent decree put in—on argument as to the limitation of seven years, the court declines to insert any such limitation in decree.

F. RYE.”

G. D. Boulton, contra.

The following decree was entered in the suit :

"TUESDAY, the 1st day of June, 1880.

"This cause, coming on to be heard this day at the sittings of this court for the examination of witnesses and hearing at the town of Barrie in the presence of counsel for both parties upon opening of the matter and hearing read the pleadings and agreements in the plaintiffs' bill of complaint mentioned, and what was alleged by counsel aforesaid :

"1. This court doth declare that the defendants are bound to erect, build, complete, and establish freight and passenger stations at Glenhuron and Nottawa on the Collingwood branch of their line of railway, under their agreements with the plaintiffs in the bill of complaint mentioned, and doth order and decree the same accordingly.

"2. And counsel aforesaid consenting thereto, this court doth further declare that under the said agreements the defendants are bound to provide each of the said stations with proper means of ingress and egress, weigh-scales, and all necessary appliances and other accommodation, and to keep a proper and competent station agent at each of the said stations during working-hours, and to sell tickets to and from each of the said stations for the two regular trains now running each way past the said stations, and for all other trains with passenger cars attached now running or hereafter to run on the said branch line and which stop or shall stop at similar way stations ; and to receive and deliver freight and luggage at each of the said stations, and for such purposes to stop at each of the said stations all freight trains now running or hereafter to run on the said branch line, and which stop or shall stop at similar way stations, whenever freight is required to be delivered at or shipped from said stations, and to keep each of the said stations lit and heated during working-hours when necessary, and to stop the mail train at both stations each way at times to be fixed in the defendants' regular time-tables, and further to stop by their said station agents at such stations all other of the aforesaid passenger trains whenever passengers, freight, or luggage require to take the cars, alight, deliver, or be shipped at said stations on or off said trains (the time of passing whereof is to be fixed by the said time-tables), and generally to maintain the said stations and each of them in the same manner as other similar way stations on the said branch line, and doth order and decree the same accordingly.

3. And this court doth further order and decree that an injunction be awarded to the plaintiffs restraining the defendants from ceasing or refraining to keep and use the said stations or either of them in the manner set forth in the two preceding paragraphs of this decree.

4. And this court doth further order and decree that the defendants do pay to the plaintiffs their costs of this suit forthwith after taxation thereof.

"GEO. S. HOLMESTED,"

Registrar.

Some time in the year 1886, after the expiration of seven years from the time when the trains commenced to run on the line of the railway, the defendants ceased to maintain the station at Avening in the manner in which up to that time they had maintained it. Up to that time the defendants had a permanent station agent at Avening; the station was kept open all day, and business transacted in the usual manner. In 1886, however, the defendants moved their station agent from Avening, and merely sent the agent from the adjoining station of Glencairn to Avening for some four hours each day. During the rest of the day the station was closed and no business could be transacted there, although trains stopped at the station, and passengers could get off and on at that point. The plaintiffs being dissatisfied with this mode of maintaining the station, brought this action. The defendants alleged that they were not bound to maintain the stations at all after the expiration of seven years from the time when trains commenced to run, and the plaintiffs alleged by way of reply that this question was constituted *res adjudicata* by the decree in the former suit. The action came on for trial before Robertson, J., at Toronto. The learned judge admitted evidence of statements alleged to have been made by certain directors, and by the secretary of the defendants, at meetings held to consider the by-law granting to the defendants the second bonus of \$20,000, to the effect that the second agreement was intended to bind the defendants to maintain the stations mentioned for all time instead of for the period of seven years only as provided in the first agreement.

At the conclusion of the case, the learned judge delivered the following judgment: "After hearing all the evidence I can quite understand how this contract came to be entered into between the parties. The Hamilton & Northwestern R. Co., having become short of funds, required an additional bonus from the township of Nottawasaga.

"Their railway had not been completed through that township, nor had it reached the intended terminus. They had already received from several other townships, and perhaps this as well—I don't exactly remember how that is—a large bonus for the purpose of establishing certain stations and maintaining them. It appears that at that time the people were disappointed at the construction put upon the first agreement, or rather, perhaps, the condition which was incorporated in it, that the company was only bound to keep these stations open for a term

of seven years. So in order to induce the ratepayers of Nottawasaga to increase the bonus, they then made another application to their council, representing what they required, and stating what they would do if that bonus was granted to them. One of the things that they particularly suggested and agreed to, was that the stations were to be placed at particular spots mentioned at the time, and that they should be kept there for all time. This having been stated fully to the council, they as a council agreed that they would submit it to the people for ratification. That having been done, these gentlemen connected with the railway company appeared before the people, and in the interest of the railway company called meetings throughout the township, at which meetings they met the ratepayers for the purpose of explaining to them what the purport and object of this agreement was, into which they were willing to enter, if an additional bonus of twenty thousand dollars was granted to them by the township. Now to my mind there is no doubt whatever that these gentlemen represented that the contract should be that they should establish these different way stations, and maintain them for all time to come in such a manner as is generally understood by people to constitute a regular way station. The upshot of that was that the bonus was carried, and it is not suggested that it was not paid to the railway company. The buildings were put up, and the stations were opened; and I think the best illustration of what is meant by a regular way station is given in the way the company discharged the service at this point—at Avening. They had four trains a day, two north and two south; two in the morning and two in the evening, and they had their station master and ticket agent and the ordinary accommodation that satisfied the people, and came completely within the terms of the agreement as both parties seemed to understand it. I say both parties, because I do not believe this or any other railway company, under the circumstances in which this agreement was entered into, would do more than they felt themselves bound to do. The consequence is that they did what they understood the agreement called for, and the stations were served in a way which satisfied the ratepayers. There was no complaint about it, and matters went on without any complaint until December, 1886, when a complete change took place, and the station was closed up except for four hours in a day. Well, it may be the fact—and I am inclined to think it is the fact—that the bargain the company had made with the township was a very hard one; but I do not see why a railway company should be excused from the performance of a hard bargain any more than an individual, or any other company. They entered into this contract with the ratepayers, and it is clear to my mind that the ratepayers never would have

granted a further bonus of twenty thousand dollars had they not agreed positively and without any question that this station was to be maintained for a number of years. I say that I think the way the company has served that station and kept it open shows they understood what they were to do. But that is not all: I think the evidence of Mr. Webster, their own witness, puts it beyond question as to what the meaning of a regular way station is. I think his definition of it is exactly within the meaning that was given to it by the company themselves by the way in which they carried out their contract up to 1886, and that since that time it cannot in fact be called a way station in the sense of the term or the words that they used to the people, and as both parties understood it. I think, therefore, that the plaintiffs have made out a case, and that the company should be required, as prayed for by the plaintiffs, to carry out that agreement in the terms prayed for and claimed by the plaintiffs, and I think they should pay the costs."

From this judgment the defendants appealed, and the appeal came on to be heard before this court (Hagarty, C.J. O., Burton, Osler and MacLennan, JJ.A.).

W. Cassels, Q.C., and R. S. Cassels for the appellants.

McCarthy, Q.C., and Pepler for the respondents.

HAGARTY, C. J. O.—I will first notice the replication of *res judicata*.

Concha v. Concha, 11 App. Cas. 541, is a clear exposition of the law as to *res judicata*. If it were necessary for the decision

and judgment in the former suit to determine the question now in controversy, then the doctrine would apply. The probate judge had awarded probate to issue on a will duly executed by English law. He

added in his decree that testator was a domiciled Englishman. The latter question was that raised in the second suit. It was held not to be *res judicata*, as it was not essential to the decree awarding probate of the will. I refer to the language of Lord Herschell and the other lords on the question, also to the case on the same will *DeMora v. Concha*, 29 Ch. D. 268. It is of course to be noticed that a large portion of the arguments and discussion in the case went to the point whether the awarding of probate was an adjudication *in rem*. This it was decidedly held not to be as to the domicile question, and it was held not to be binding *inter partes* because the executors did not properly represent the claimant to a large portion of the residuary estate; see the judgment of Bowen, L. J., in the 29 Ch. D. suit. It is pointed out both by him and by Lord Blackburn in the Lords (p. 565) that without its amounting to any-

Res adjudicata
—Effect of decree of Injunction.

thing *in rem* or being an estoppel in that sense you may be concluded by its being *res judicata* as between the same parties.

The difficulty in our case is that no such question as is here raised appears to have been litigated between the parties to the former suit, viz., the seven years' limitation. No reference whatever is made to it either in bill or defence. The seven years began to run about 1879. The decree was in June, 1880, and was proper in its form without any reference to this point. Both agreements are set out in the bill. The decree is drawn up on reading the pleadings and agreements, and declares defendants bound to erect, build, complete, and establish stations at Glenhuron and Nottawa, under their agreements, and awards an injunction restraining defendants from ceasing or refraining to keep and use the said stations, etc. On the brief of one of the counsel was endorsed "consent decree put in, on a request as to limitation of seven years, the court declines to insert any such limitation in decree." A minute of the case as is said from the learned vice-chancellor's notes is put in. (The learned judge read the notes and decree, and continued.)

This decree in no way rests upon any point as to limitation of time; at least six years of the seven had yet to run; the decree professes to be based on the two agreements, and I can find no controversy or question raised as to how this limit is to be regarded. Giving the plaintiffs the full benefit of what is stated in the memorandum on the brief we find nothing to indicate that the court was expressing any opinion on the question, but simply declined to insert any reference to the seven years. I am strongly of opinion that the proper conclusion for us to draw is, that the learned judge declined in any way adjudicating on such a question in a consent decree, and on a point not argued, leaving it to be decided thereafter when it might become important. I think that would be the natural and proper course to have taken in such a case. I should have been rather surprised if any court had without argument, and without such a question appearing in the pleadings, have unnecessarily taken upon itself to decide such a point. I think the respondents fail as to this point. I may refer to *Moss v. Anglo-Egyptian Navigation Co.*, L. R. 1 Ch. 108, and such like cases. They are very numerous. I cannot think that the awarding an injunction without any limit of time, necessarily involves the conclusion that it means forever. Whenever an injunction is obtained on the basis of a contract, it seems to me that its operation must be necessarily limited in duration to the time that the relation between the contracting parties and those claiming under them may exist.

Apart from this *res judicata* question I think the decision of the case must depend wholly on the construction to be placed

on the existing special contract between the parties. We are unable to agree with the learned judge in his view as to the admissibility of a large quantity of evidence offered by the plaintiffs as to speeches made at and prior to the voting on the by-law by persons alleged to be agents of the defendants, in which they stated that under the new agreement, depending on the result of the decision of the electors, the stations were to be maintained permanently, and not as under the then existing contract only for seven years. We think the legal construction of the written contract must govern.

We can fully understand the case of parties resisting the performance of an agreement, sought to be enforced against them, by proof that their execution of it was obtained by false representations or fraudulent misstatements of its effect to the plaintiffs or the agents through whom it was obtained. See such cases as *Corporation of Huron v. Armstrong*, 27 U. C. R. 533. And, again, we can understand after persons have executed a contract and discovered that they have been deceived and entrapped into its execution, their applying to the court either for reformation or rescission. The case before us is of a wholly different character. The bill sets forth two agreements, one in 1873, the other in 1878, and states an insufficient keeping of the station at Avening, as not being sufficient for public accommodation in the manner in which it is worked, and not in accordance with the defendants' contract on which they obtained large grants or "bonuses," in all \$40,000, from the township. The defendants deny the insufficiency alleged, and state that their liability ceased at the expiration of seven years from the running of the trains, which term had expired. Reply as to this *res judicata*. The claim is merely a contract set out, and a statement of its infringement. There is nothing claimed as to either rescission or reformation.

The arguments pressed on us were in substance that the defendants are bound, as to the meaning of the contract, by the speeches and statements of persons in defendants' interest in canvassing for votes, and to influence votes, for the by-law. I can hardly conceive anything more dangerous or far reaching in its evil consequences, than to insist that in construing a written contract between parties, the court is to be influenced, or rather guided, in its decision as to the legal meaning of the terms used, by electioneering speeches uttered ten years previously in canvassing for votes, or haranguing from hustings as to the adoption by the voters of any public contract or measure. Few by-laws requiring the sanction of the ratepayers would stand a rigid application of any such system of construction. In the court below the case was not decided against the defendants either on

the *res judicata* defence, or on the actual legal import of the contracts, but rested very much on alleged speeches and representations.

We must examine the contracts. (The learned judge read the first agreement and continued.) This agreement is plain and explicit, the obligation is limited to the seven years during which the stations are to be "well and sufficiently kept and maintained." In the spring of 1878 the defendants applied for further aid from the township to enable them to extend the road from Glencairn to Collingwood. The second agreement was dated 25th May, 1878; the voting was in June, 1878. The road appears to have been opened about July, 1879.

Agreements
examined.

Avening is between Glencairn and Collingwood, and the additional aid was required, as defendants urged, to get the line made from Glencairn to Collingwood, and Avening had not been a station till 1879. (The learned judge read the second agreement and continued.) The first and only express reference to the first agreement is in this last paragraph, which declares that the route of the line as mentioned and defined therein may be deviated from so far as to admit placing the stations at the points mentioned in the preceding paragraph, as being necessary and expedient from natural and engineering difficulties, and the defendants are released from the obligation to place them at the points mentioned in the first agreement, and "the places herein defined for stations shall be taken to be in substitution for the places mentioned in such former agreement." This agreement was made before the time named for the seven years to commence.

The only apparent change as to stations is as to locality; it seems to me that all other provisions and agreements as to such stations, apart from locality, would remain unaffected. The words used are identical in each as to "erect, build, and complete," etc., etc., down to the words "regular way stations." It is quite true that the covenant as to erecting the stations need not necessarily have been inserted in the second agreement, a simple provision that the locality was to be changed would have sufficed. Then comes the provision that defendants need not erect the stations at the former point. That would be unnecessary, if an express change of locality had been alone mentioned. The new "places" are to be taken in substitution for the "places" in former agreement. If there had been a special provision as to large extra accommodations at one or more of the first named stations, I think the township would hardly have considered that a change in its locality would release the company from providing the named accommodation. If a man on leasing land had contracted to build a house and maintain it in good repair

for seven years, and if after one year had expired, he made an agreement with his landlord to change the locality of the house to another point on the premises in place of the first named point, I do not think that would bind him to maintain it beyond the original limit of time. If we hold the seven years' limitation not to apply to the second agreement, the difficulty remains as to whether on its terms, the obligation is for all time. Literally the agreement has been complied with; stations were erected, built, completed, and established at the named points, and continued there for a number of years; and as to the station in question, it is still maintained, although in a state of reduced efficiency.

The plaintiffs sought to strengthen their position by reference to the words in the first agreement, "Keep and maintain." But this is followed by the express limitation as to the seven years, and must be subject thereto. Nothing about "maintaining," can, I think, be imported into the second agreement without such limitation. Then the case has to rest on "erect, build, complete, and establish." We have not to deal with an illusory performance of the contract, such as the mere erection, and non-user or immediate abandonment. The stations have been used for years. I am of opinion that the words "erect, build, complete, and establish" do not involve in themselves the continuance for ever, or as it were during the lifetime or existence of the undertaking as a running concern, and that a covenant so worded is in a case like the present complied with by the erection and completion

"Erect, build, and maintain"—Effect of phrase.

and user in good faith thereof for a number of years, and that if it be sought to bind a company for perpetuity or a distinct term of years to such user, apt words should be used in the contract executed by both parties, and that in our construction we cannot import into it conditions not comprised in the words used. We have been favored by the perusal of the judgment lately pronounced by Mr. Justice Strong in *Bickford v. Town of Chatham*. His vigorous language on this point, as a question of construction, clearly shows the general rule to be observed—our view of the law in our judgment in that case. The views expressed by me, and also by Mr. Justice Patterson, were largely influenced by the language used in other parts of the contract from which we sought to clothe with larger meaning the bare words of the undertaking "to construct."

Lord Selborne's language, in *Wilson v. Southampton R. Co.*, L. R. 9 Ch. 279, may be applied to the present case with much force. I especially notice his remarks as to the damages to be recoverable in an action for not performing the covenant in that case: "That the company were expected to use it is very probable, but it is not so expressd, and the court if it attempted to

impose on the company anything like a definite obligation as to the use of the station, would not be executing the written agreement, but enlarging it."

The plaintiffs' counsel cited *Wallace v. Great Western R. Co.*, 3 A. R. 44, in this court. But the covenant there was "to erect and maintain a permanent freight and passenger station." *Jessup v. Grand Trunk R. Co.*, 7 A. R. 128, is not an authority of general application, turning on its special fact as to land granted in consideration of a station being placed on it. The words used included "keep and maintain." In the same volume is reported *Geauyeau v. Great Western R. Co.*, 3 A. R. 412. The agreement stated was "to establish the Western terminus and depot, on plaintiffs' land. Mr. Justice Patterson leaned strongly against the view that under the word "establish" there was the meaning "maintain and use for ever" (pp. 423-4). His language as to construction, is very applicable here. Moss, C.J., said he refrained from expressing any opinion on the meaning of the word "establish" as he rested his decision on other grounds.

I see nothing in this particular word to assist us in inferring a contract for any protracted user. It may, perhaps, assist the argument as against a mere illusory erection of a station, and that at least a station in full working order, in use, or ready for use, would be implied. There was a station set up and established here and used for years. Unless we hold the word "establish" to mean permanent, co-existent with the existence of the railway, I see nothing in it to help plaintiffs. Short of giving it that extended meaning, it is useless on this point for decision.

It was asked what consideration did plaintiffs get for the second \$20,000. The answer may be that the road was stopped at Glencairn for want of funds, and that without this help they could not get the line through Avening and the other points to Colingwood.

On the whole the appeal should be allowed, and plaintiffs' bill dismissed.

OSLER, J. A.—If the agreement of the 25th May, 1878, stands by itself, there is no limitation of the covenant to establish regular way stations, if that word is to be read as meaning to maintain permanently. The company bind themselves not only to build, erect, and complete good and sufficient, and suitable station buildings for passengers and freight, but also to establish at each of the places specified regular way stations. In this respect the language is identical with that of the agreement of the 19th May, 1873. In the latter agreement, however, the word "establish" is evidently not used as equivalent to "permanently establish" or "fix or maintain permanently," but merely as descriptive of, or in connection

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with the character of the station, i.e., regular way stations. The clause which follows shows that it was employed in a limited sense, providing as it does in unequivocal terms that the company shall and will well and sufficiently keep and maintain the said stations, with all such proper, suitable, and necessary buildings as the business done at the stations may require for seven years after the trains shall have commenced to run on the road, etc.

The object of the second agreement, which was made before the line had been opened or completed, was first and principally to change the sites of the stations as specified in the former agreement, and secondly to permit the company to deviate from the line of route therein defined, so as to admit of the stations being located at the new sites. The first agreement is referred to for the purpose, as I think, of showing that it is not varied or abandoned except in these particulars, thus: (1) The route of the line defined in the former agreement may be deviated from to such an extent as to admit of the stations, that is, the five stations which the company were by that agreement required to build on the Collingwood section of the line, being placed and located at the points in that line specified in the new agreement, instead of the old; (2) It is declared that it shall not be incumbent on the company to erect stations at the places mentioned in the former agreement, but that the places defined for stations in the new agreement, shall be taken to be in substitution for the places mentioned in the former. This was an entirely unnecessary provision if the two agreements were not to be read together, for the line of route being varied, the former agreement as to placing the stations on the line therein defined became impossible of performance.

I see no reason for giving to the word "establish" in the second agreement a larger meaning than the parties had already given to it, or for thinking that the plaintiffs meant to incur the risk of abandoning their clear right of having the stations kept and maintained as such for seven years. The construction, in short, which I place upon the second agreement is, that the five stations which, by the first agreement the company contracted to erect, build, complete, and establish, were to be so erected, built, completed and established at the places substituted by that agreement for those mentioned in the first agreement; the line of route of the railway being deviated so far as was necessary to carry that out. Having established the stations and kept and maintained them for the seven years mentioned in the first agreement, I think the agreement has been fulfilled, and that their obligation is at an end.

I entirely concur in the view that the evidence of representa-

Agreements
fulfilled by
maintaining
stations for
seven years.

tions or statements made as to the meaning of the second agreement, in canvassing the electors and working up public sentiment in favor of the by-law, was improperly admitted. The agreement had been executed. No case is made on the pleadings or evidence for rectification on the ground of mistake, and the meaning of the agreement cannot be controlled or varied or explained by what canvassers or orators, on behalf of the railway, may have said as to their understanding of its effect.

The decree in the former suit between these parties is set up as showing that the construction of the agreements is *res judicata*. It is not pleaded in the statement of claim, though I do not rest upon that. It is a consent decree based upon the two agreements which are set out in the bill. As the first agreement was relied on in that suit by the plaintiffs, and the seven years had but just begun to run, the right of the plaintiffs to relief upon the footing of that agreement was clear. The second was necessarily set out in the bill to show the change in the location of the stations, but the plaintiffs might have relied upon it alone, alleging their present view of its meaning, if they had desired to obtain the opinion of the court as to the obligation of the defendants to maintain or keep up the stations forever. Having pleaded and relied upon the first agreement, it was only necessary to decide, and we cannot see that anything more was decided than that the company were, as things then stood, under the two agreements, bound to keep and maintain the stations then in question. It is impossible to say that the judgment is a declaration of an unqualified liability for all time under the second agreement, and if it proceeds at all upon the first, as it unquestionably does, its binding force must be controlled by the limitation prescribed in that agreement.

Representations
at election
meetings.

Plea of res
adjudicata.

BURTON and MACLENNAN, JJ.A., concurred.

Appeal allowed with costs.

Stations—Agreements to Influence Location of.—Contracts by which officers or other persons supposed to be influential with the company undertake for a consideration to secure the location of stations, etc., at a particular place, are against public policy and void. *Louisville, N. A. & C. R. Co. v. Sumner* (Ind.), 24 Am. & Eng. R. Cas. 641; *Berryman v. Cincinnati Southern R. Trustees*, 14 Bush. (Ky.) 755; *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Linder v. Carpenter*, 62 Ill. 309; *Bestor v. Wathen*, 60 Ill. 138; *Woodstock Iron Co. v. Richmond & D. Extension Co.* (U. S.), *ante*, p. 683. Thus contract to pay the director of a railroad who owns and controls the greater part of its stock, a sum in consideration of his causing the line of road to be located on a certain route and a depot to be built at a certain place instead of adopting another shorter route then surveyed, is invalid. *Holladay v. Patterson*, 5 Or. 177.

But a contract to pay a sum of money to one who should present a petition or proposition to the directors of a company for the location of a depot on certain land, the money to be paid on location of the depot and

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completion of the road, is not void as against public policy, unless it appears that sinister, extraneous, or corrupting influences were brought to bear upon the company to induce the location. *Workman v. Campbell*, 46 Mo. 305.

Same—Validity of Contracts to Locate in Particular Place.—Railroad companies have unlimited power to locate their depots for the best interest of the community and of the road, even though a money consideration be paid therefor, but they cannot make a matter of commerce of them as a punishment to a non-subscribing town. *Currie v. Natchez, J. & C. R. Co.* (Miss.), 20 Am. & Eng. R. Cas. 303.

An agreement between an individual and a railway company for the location of a station or depot at a particular place, in consideration of a donation of money or property to the corporation, is valid if made without any restriction or prohibition against any other location (*Louisville, N. A. & C. R. Co. v. Sumner* (Ind.), 24 Am. & Eng. R. Cas. 641; *McClure v. Missouri Riv., F. S. & G. R. Co.*, 9 Kan. 377), and without any stipulation that the company should deflect from its intended route (*Atchison, T. & S. F. R. Co. v. Jefferson Co.*, 21 Kan. 229); and a company may bind itself to maintain perpetually a depot at a particular place. *International & G. N. R. Co. v. Dawson*, 62 Tex. 260.

But, on the other hand, it has been held that a conveyance of land to a railroad company for purposes of speculation in consideration of the location of a freight and passenger depot upon the line of the grantor, is void as against public policy if there is no evidence that the land was intended to be used for the general business of locating, constructing, managing, and operating a road. *Pacific R. Co. v. Seely*, 45 Mo. 205. The court appears to have decided this case upon the ground that such an agreement might be induced by prospects of mere gain, and that thus the general welfare of the public, to serve which the charter of the company was granted in part at least, might be sacrificed to subserve mere private interests.

It is the duty of a railroad company to furnish reasonable depot facilities for the accommodation of the public, and a contract in contravention of this duty is against public policy and void. *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan. 602. Accordingly, the following contracts have been held to be invalid, viz.: a contract not to locate a station at a place where the demands of business or concentration of population may at some future time require it (*Louisville, N. A. & C. R. Co. v. Sumner* (Ind.), 24 Am. & Eng. R. Cas. 641); a contract that the station and depot erected on lands donated shall be the only one in the city (*Williamson v. Chicago, R. I. & P. R. Co.*, 53 Iowa, 126; *Marsh v. Fairbury, P. & N. W. R. Co.*, 64 Ill. 414); and a contract not to have or use a depot within three miles of a particular point (*St. Louis, J. & C. R. Co. v. Mathers*, 71 Ill. 592; *Same v. Same* (Ill.), 9 Am. & Eng. R. Cas. 600; *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan. 602). But in *Mahaska County R. Co. v. Des Moines Val. R. Co.*, 28 Iowa, 437, a stipulation made by a railroad company which had partly constructed its road, that another company to which the road-bed was conveyed should allow "but one other depot" between certain points, was treated as valid by both court and counsel without raising any question. And it has been held that a subscription to the stock of a railroad company is not invalid because it is payable on condition of the location of a depot in a particular part of a town through which the road is to pass. *Racine County Bank v. Ayres*, 12 Wis. 570.

But while it would appear that a contract that a depot should not be built at or near some particular town or city for the space of one year is illegal, the court cannot, without knowing the facts, determine as matter of law that a contract not to build a depot at a particular place, not a

town or city, for the space of one year only, would be against public policy. *Tucker v. Allen*, 16 Kan. 312.

The parties to a contract, which is illegal because of a stipulation that no other depot should be erected, are *in pari delicto*, and the court will not interfere to protect the rights of either. *Williamson v. Chicago*, R. I. & P. R. Co., 53 Iowa, 126; *St. Louis, J. & C. R. Co. v. Mathers* (Ill.), 9 Am. & Eng. R. Cas. 600. Thus, an action for damages for breach of the condition cannot be maintained. *Williamson v. Chicago*, R. I. & P. R. Co., 53 Iowa, 126. Nor where lands have been conveyed to the company in consideration of such a contract, will the court direct a reconveyance on the occurrence of a breach. *St. Louis, J. & C. R. Co. v. Mathers*, 71 Ill. 592. And where the owner of lots conveyed the same in trust for the benefit of a railroad company in consideration of the illegal agreement of the company not to establish any depot or station within three miles of a certain place on its road, and the trustee afterwards reconveyed the property back to the grantor, it was held that the company could not maintain a bill to have the lots sold for its benefit and have the same again conveyed to the trustee for its benefit. *St. Louis, J. & C. R. Co. v. Mathers* (Ill.), 9 Am. & Eng. R. Cas. 600.

Same—Parol Testimony to Establish Condition in Conveyance of Lands.—

Parol evidence is not admissible to prove that a conveyance of land for right of way was granted upon condition subsequent of the erection of a depot at a certain point. *Galveston, H. & S. A. R. Co. v. Pfeuffer* (Tex.), 11 Am. & Eng. R. Cas. 373. But it has been held that where the owner of land releases for one dollar, to a railroad company, the right of way through his land, and sells it a lot on which to erect a depot, he may, in an action against the company for not erecting the depot, show by parol evidence that its erection was the consideration for the release. *Watterson v. Allegheny Val. R. Co.*, 74 Pa. St. 208. So, too, where a deed of land to a railroad company reciting a consideration of one dollar, conveys one parcel "only for depot and other railway purposes" and another parcel adjoining "for a railway," parol evidence that no money was paid for the land, and that the only consideration for the conveyance was the condition that the railway depot should be erected on the land, is properly admitted in an action of ejectment to recover possession, for the purpose of aiding in the construction of the deed. *Horner v. Chicago, M. & St. P. R. Co.*, 38 Wis. 165.

Same—Nature of Stipulations in Conveyances.—A stipulation in a conveyance of lands that a depot should be erected on the premises conveyed is usually construed as a condition subsequent, and not as a covenant. A stipulation in a deed in these terms, "provided a depot is permanently located within one half mile west of the town of S.," is a condition subsequent, and upon a breach thereof, the estate conveyed by the deed is defeated. *Taylor v. Cedar Rapids & St. P. R. Co.*, 25 Iowa, 371. Where a deed of land conveys one parcel "only for depot and other railroad purposes," and another parcel adjoining the same "for a railway," the words specifying the purposes for which the grants were made must be construed as conditions subsequent; but a breach of the condition as to one parcel works a forfeiture only of that parcel, and not of both. *Horner v. Chicago, M. & St. P. R. Co.*, 38 Wis. 165. The following clause coming after the description and preceding the *habendum* in a deed to a railroad company, "but this conveyance is made upon the express condition that said railway company shall build, erect, and maintain a depot, or station-house, on the land herein described," etc., was held to be an express condition subsequent in *Blanchard v. Detroit, L. & M. R. Co.*, 31 Mich. 42. Where a deed recites that it is made "in consideration of the sum of one dollar, and the permanent location of

depot on grounds conveyed," the grantee therein does not undertake any personal obligation to permanently maintain a depot, and the stipulation is only a condition subsequent. *Close v. Burlington, C. R. & N. R. Co.* (Iowa), 17 Am. & Eng. R. Cas. 33.

Accordingly, such conditions cannot be enforced specifically against the grantee in the deed (*Blanchard v. Detroit, L. & M. R. Co.* 31 Mich. 42); and the grantor's remedy is by re-entry for breach of the condition subsequent. *Close v. Burlington, C. R. & N. R. Co.* (Iowa), 17 Am. & Eng. R. Cas. 33.

But, on the other hand, it has been held that where the grantor, in consideration of \$25, and the building of the railroad, conveyed to a company, its successors, or assigns forever, in fee simple, the right of way through his land, and added in the deed the following words: "It is hereby agreed and understood a depot and station is to be located and given to said Osborne Reeves, on the land or strip above conveyed, to be permanently located for the benefit of said Osborne Reeves and his assigns, and to be used for the general purposes of the railroad company," the grantee by accepting such deed, entered into a covenant to comply with its terms, and this covenant ran with the land and was obligatory upon the purchaser of the property and franchises of the grantee. *Georgia S. R. Co. v. Reeves (Ga.)*, 11 Am. & Eng. R. Cas. 333.

In *Hubbard v. Kansas City, St. J. & C. V. R. Co.*, 63 Mo. 68, an owner of land executed a writing granting to the company a right of way over his land, which contained this clause, "depot to be erected in," etc., and it was held that this did not amount to a condition, and that the railroad company having taken the right of way and failed to erect a depot, the grantor's only remedy was an action for obtaining land under false pretenses, in which the measure of damages would be the value of the land taken.

In *Pipkin v. Long Island R. Co.*, 2 Barb. Ch. (N. Y.) 221, the court treated the condition as creating an easement or servitude. In that case, an agreement was made by a railroad company with a person owning land adjacent to the railroad to establish and maintain a permanent turnout track and stopping place at a particular point in the neighborhood of his property, and to stop the freight trains and passenger cars of the company there. It was held that this was, in substance, the grant of an easement or servitude, which is to be binding upon the property of the company, as the servient tenement, for the benefit of the owner of such adjacent property and his successors in his estate, and such agreement to be valid must be in writing.

Where an agreement is made with a railroad company by which a land-owner is to convey certain lots to the company, and the company agrees to erect a depot thereon, which would have been of advantage to other property of the land-owner, the conveyance of the lots is a condition precedent without the performance of which the land-owner could not maintain an action for damages for failure to erect a depot. *Sayre v. New York & H. R. Co.*, 3 Duer (N. Y.), 54.

Same—Subscriptions Conditioned upon Location of.—A contract by which the subscribers bind and obligate themselves to subscribe to the capital stock of a railroad company, one half of the subscription to be paid in six months and one half in twelve months from the date of the subscription, on condition that a depot is located on certain lands, and which narrates that the subscription is made to comply with the terms on which the directors of the company have made the location of the depot on said land, is a subscription *in presenti* and not a mere agreement to subscribe in future, and becomes absolute upon the location of the depot at the designated place. *North Missouri R. Co. v. Miller*, 31 Mo. 19. A con-

dition in the subscription of a town to the stock of a company that the road "shall be built through the town on the line as run by the engineer with a suitable depot for the convenience of the public," is a condition subsequent and will not defeat the right to collect the assessments before the performance of the contract. *Belfast & M. L. R. Co. v. Brook*, 60 Me. 568. Where a subscription was made for stock in a railroad company payable at such times and in such instalments as the directors might prescribe, provided the road is "permanently located" on a given route, and that a "freight-house and depot be built" at a point named, the subscription became absolute on the permanent location of the road, and the provision in relation to the erection of the buildings was a stipulation merely, and its performance was not a condition precedent to the right to collect the amount of the subscription. *Chamberlain v. Painesville & H. R. Co.*, 15 Ohio St. 225.

An alteration in the charter of a company by which one half of the proposed line is to be built by another company, is sufficient to avoid a promissory note given in consideration of the location of the depot of the original company in a certain city. *Carlisle v. Terre Haute & R. R. Co.*, 6 Ind. 316.

Same—Performance of Contracts to Locate.—The erection of buildings without providing the necessary agents and employees at a station is not a compliance with an agreement to erect, maintain, and equip a permanent freight and passenger station at a certain village. *Township of Wallace v. Great Western R. Co.*, 25 Grant Ch., U. C. 86; s. c., 3 Ont. App. 44.

Where a conveyance of land to a railroad company is made on condition that it should make the village of C. a station, and the company makes C. a station, but locates its depot about one quarter of a mile from the town plat, there is a sufficient compliance with the condition of the deed. *Jenkins v. Burlington & M. R. R. Co.*, 29 Iowa, 255. An express condition in a note payable to a railroad company "that a depot be constructed within 80 rods of the present town of W." is not fulfilled by the building of a depot within 80 rods of the limits of the town as extended after the note was given. *Davenport & St. P. R. Co. v. Rogers*, 39 Iowa, 298. The building of a side track which was operated as such, and a depot thereon, at a place within a mile of the post-office of a certain town, is a substantial compliance with a stipulation in a contract to aid the construction of a railroad, that the company build a depot and open its road to a point within one mile of the post-office, even though the main track of the road was not, nor was the whole of the depot building, within the mile. *Cedar Falls & M. R. Co. v. Rich*, 33 Iowa, 113. The construction, on the lands conveyed, of a warehouse for the accommodation of the public doing business on the road and of facilities for loading and unloading live stock, coal, and lumber, is a sufficient compliance with the condition of the conveyance of the lands that they should be occupied for the western part of the company's depot grounds on the part of the usual buildings erected thereon, although the principal buildings have been erected by the company at a distance of 40 rods east of the lands conveyed. *Pittsburgh, Ft. W. & C. R. Co. v. Rose*, 24 Iowa, 219.

A railroad company covenanted with a land-owner that a piece of the land purchased should forever thereafter be used as a first-class station. The railway company was afterwards made part of a company operating a much longer line. Twenty-one years after the date of the conveyance the land-owner filed a bill to compel the company to build a larger station and to stop all the trains at that station. *Held*, that as the existing station had not been objected to and had remained for many years, and as it did not appear that the passengers were numerous, the court would not compel the erection of a larger station, but that as many trains as stopped at any

other station between the *termini* of the original railway, excepting mail, express, and special trains, must stop at that station. *Hood v. North-eastern R. Co.*, L. R. 5 Ch. 525.

Where, by the terms of a contract granting to a railroad company certain franchises, the company were to build or allow "but one other depot" between certain points, it was held that a station at a coal bank where trains merely stopped to take or leave cars connected with this train was not a depot within the meaning of the contract. *Mahaska County R. Co. v. Des Moines Val. R. Co.*, 28 Iowa, 437.

When, by the terms of a contract, the station is to be located within a certain distance of a point, it would appear that the distance should be measured by a direct line rather than by the nearest travelled route. *Cedar Rapids & M. R. Co. v. Rich*, 33 Iowa, 113.

Where real estate is conveyed to a railroad company "for, and in consideration of the permanent location and construction of a depot of said railroad" thereon, and such depot is constructed upon said land but is subsequently removed, the removal constitutes a breach of the implied condition subsequent in the deed and the lands revert to the grantor. *Indianapolis, P. & C. R. Co. v. Hood*, 66 Ind. 580. A deed declared that the lands conveyed were deeded "expressly for the use and purpose of depot grounds," and that in case of failure "to erect buildings and occupy said ground for the use and purpose above mentioned" the ground should revert back to the donors. *Held*, that the condition was fulfilled by erecting a depot and maintaining it upon the land for a reasonable time only; that the use of the land for the specified purpose for a period of thirty years was a substantial compliance with the condition; and that, on cesser of the use after that time, the land did not revert. *Jeffersonville, M. & I. R. Co. v. Barbour (Ind.)*, 14 Am. & Eng. R. Cas. 466. The court distinguished this case from *Indianapolis, P. & C. R. Co. v. Hood*, 66 Ind. 580, on the ground that in the latter case it was apparent from the terms of the conveyance that the use of the lands was intended to be permanent. In *Jessup v. Grand Trunk R. Co.*, 28 Grant Ch. (U. C.) 583, it was held that when land has been conveyed to a railroad company "in consideration of the company placing the station for P. upon his land," and the station has been built and maintained for over 20 years, the grantor is entitled, upon the removal of the station to a point a mile and a half away, to damages, or a restitution of the land.

If a company, which has agreed to erect and maintain a permanent freight and passenger station at a certain point, leases its line to another company which agrees to equip, maintain, and work the line, the agreement to maintain the station is binding upon the lessee. *Township of Wallace v. Great Western R. Co.*, 25 Grant Ch. (U. C.) 86; s. c., 3 Ont. App. 44.

Same—Fraud on Part of Company.—A statement that 12 acres were required for depot purposes is not sufficient, in the absence of evidence that it was made with fraudulent intent, to avoid a conveyance of that quantity of land granted in consideration of the location of a depot, although in point of fact only three acres were required and actually used. *Jones v. St. Louis, K. C. & N. R. Co. (Mo.)*, 20 Am. & Eng. R. Cas. 371.

Where a railroad company, for the purpose of compelling a land-owner to convey to it certain riparian rights, threatened to remove its depot, and the land-owner thereupon conveyed the riparian rights in question upon the condition that the location of the depot should not be changed, and the company thereafter refused to do business at such depot except a certain street was closed, and induced a mortgagee of plaintiff's premises to foreclose and sell for the purpose of defeating plaintiff's claim to damages for failure to maintain the depot in terms of the contract, the plaintiff has

a cause of action in tort, and may prove the agreement to restore the depot and its breach; that the restoration would have greatly enhanced the value of plaintiff's property; that the defendant procured and instigated a foreclosure sale; and also the declarations of defendant's officers as to the reasons for refusing to restore the depot. *Rich v. New York Cent. & H. R. R. Co.* (N. Y.), 11 Am. & Eng. R. Cas. 594.

Same—Remedy of Grantor of Lands.—Where land was donated upon condition subsequent of the permanent location of a depot upon the ground, and after its erection and destruction by fire the company conveyed the premises to another company, which failed to rebuild, but located its depot elsewhere, the grantors cannot recover damages for the breach of the condition, but they are entitled to redelivery of notes given by them as an extra consideration for the erection of the depot, and to a release by the company of its right to the land. *Close v. Burlington, C. R. & N. R. Co.* (Iowa), 17 Am. & Eng. R. Cas. 33. When, by the terms of a deed conveying land, it is to be used for depot purposes alone, the remedy of the grantor, in the event of its being devoted to other purposes, is by re-entry, and not by suit, to set aside the deed. *Jones v. St. Louis, K. C. & N. R. Co.* (Mo.), 20 Am. & Eng. R. Cas. 371.

If the company fails to fulfil a written agreement to construct a side track, depot, and station buildings on the premises of the land-owner, the land-owner can at once, upon breach of the contract, bring his action at law for damages against the railway company, and need not resort to statutory proceedings to have compensation for the right of way assessed. *Kansas Pac. R. Co. v. Hopkins*, 18 Kan. 494.

A company agreed for valuable consideration with a land-owner to construct a station on certain lands which they had bought from him. The agreement contained no further description of the station, nor any stipulations as to the use of it. The company having refused to erect a station at the specified place, and substituted one at a distance of two miles, *held*, that specific performance of the contract was properly refused, and that the plaintiff ought to be left to his remedy by action for damages. *Wilson v. Northampton & B. J. R. Co.*, L. R. 9 Ch. 279.

The company having failed to erect a depot in terms of the condition in a deed conveying lands, the grantor filed a bill charging that no depot building had been erected; alleging the width of the land occupied by, and necessary for the operation of, the road, and seeking to recover that portion of the land not required for the operation of the road; "wherefore the plaintiff prays that the court adjudge said land to have reverted to the plaintiff; that said deed be declared void; that plaintiff have possession thereof; and for judgment for his costs, and all proper and general relief." *Held*, that as the petition set forth an action for the partial rescission of the contract, while the prayer was for a complete rescission, the relief sought was inconsistent with the petition, and the action must be dismissed. *Crow v. Owensboro & N. R. Co.* (Ky.), 17 Am. & Eng. R. Cas. 33.

A bill in equity will lie to restrain a breach of a contract by which a company has agreed for a sufficient consideration to stop all trains at a particular station. *Lindsay v. Great Northern R. Co.*, 17 Jur. 522.

Same—Measure of Damages in Case of Breach.—Where the company has failed to locate a depot in terms of its contract with an individual who donated land to it, the measure of damages is the loss of the increased value which would have resulted to the property adjoining if the depot had been located and maintained (Louisville, N. A. & C. R. Co. *v.* Sumner (Ind.)), 24 Am. & Eng. R. Cas. 641; *Watterson v. Allegheny Val. R. Co.*, 74 Pa. St. 208; *West Chester & P. R. Co. v. Broomall* (Pa.), 26 Am. & Eng. R. Cas. 591), but not prospective profits of business to be engaged in by the plain-

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tiff. *Watterson v. Allegheny Val. R. Co.*, 74 Pa. St. 208. But it would appear that where a railroad company has, pursuant to an agreement with a city to donate lands, erected the depot on the location fixed at the time of the agreement, one who is induced by the location of the depot at that point to purchase lands and engage in business there is entitled to maintain an action in the event of the subsequent removal of the station, and, as part of such damages, he is entitled to compensation for loss of custom, reduction in rents, and depreciation in the value of the property for the purpose for which it was constructed, *e.g.*, a hotel. *Houston & T. C. R. Co. v. Molloy (Tex.)*, 25 Am. & Eng. R. Cas. 244.

If the grantor of land for a right of way bring an action for damages for breach of a separate collateral agreement by the company to locate a depot at a certain place, the measure of his damage has no relation to the value of the land released, but is determined by the injury resulting to him from the erection of a depot elsewhere, and the non-delivery of passengers and freight at the place agreed upon. *Galveston, H. & S. A. R. Co. v. Pfeuffer (Tex.)*, 11 Am. & Eng. R. Cas. 373.

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- Presumption of authority to affix seal is not overcome by failure to

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- Recognition of company's title to lands and estoppel of owner thereby may be pleaded in condemnation proceedings, and does not form ground for enjoining such proceeding. *Keokuk, etc., R. Co. v. Donnell* (Iowa). 650.

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- Abutting lot-owner's right to damages for construction of street railway. *Smith v. East End St. R. Co.* (Tenn.). 470.
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- rendering company liable for failure to fence does not apply when fence has been destroyed by fire. *Martin v. Stewart* (Wis.). 316.
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Although a lease of a railroad was made without statutory authority, the lessee, and not the lessor, is liable for injuries to an employee of lessee caused by incompetency of its engineer. *East Line, etc., R. Co. v. Culbertson* (Tex.). 225.
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Right of abutting lot-owner to damages for construction of street railway. *Smith v. East End St. R. Co. (Tenn.)*. 470.

Statute held to authorize successive applications for appointment of commissioners to determine expediency of constructing road. *In re People's R. Co. (N. Y.)*. 404.

SUBROGATION. See LIENS.

SUNDAY.

Brakeman violating Sunday law may recover for injuries.

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Louisville, etc., *R. Co. v. Buck (Ind.)*. 152.

Liability for injuries received on Sunday. 161 *n.*

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USURY.

Bond valid at place of issue if rate of interest legal there, although void for usury in domicile of grantor. *Nelson v. Haywood Co. (Tenn.)*. 620.

WATERS.

Company not bound to provide against unprecedented floods in constructing bridges. *Columbus, etc., R. Co. v. Bridges (Ala.)*. 136.

Contributory negligence in running over bridge during dangerous floods. *Columbus, etc., R. Co. v. Bridges (Ala.)*. 136.

Liability for injuries caused by violent floods. 141 *n.*

